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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING CO. OF MONTANA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

This action was brought by defendant in error in September, 1893, in the United States Circuit Court for the District of Montana, against The Montana Mining Company, Limited, plaintiff in error, and Rawlinson T. Bayliss, Alexander Burrell, Nicholas Francis, Isaac Warren, Joseph Harvey, John Jewell, and Thomas Hawkins, to recover damages against them in the sum of $200,000 for ores alleged to have been mined by them from a lode alleged to have its top or apex within the surface boundaries of its St. Louis mining claim, and in connection therewith to try the title to the lode from which it was alleged ore had been mined and which defendant in error claimed to own. In paragraph

1 the complainant alleged that the plaintiff was a corporation organized and existing under the laws of the State of Montana, and as such authorized to hold, have, possess, use, and enjoy mining properties in said State, with all the rights, privileges, and immunities incident and appurtenant thereto and usually had, held, used, and enjoyed in connection therewith, and that the defendant, plaintiff in error here, was a corporation incorporated and organized under the laws of the Kingdom of Great Britain, and as such, by virtue of its compliance with the statutes of the State of Montana, entitled to do and transact a mining business and to have, hold, use, and enjoy mining property therein, with all the rights, privileges, and immunities incident thereto and usually had and enjoyed in connection therewith (Supp. Record).

In paragraph 2 it was alleged that the plaintiff, as such corporation, was the owner of and entitled to the possession of the St. Louis Quartz Lode mining claim, and all veins, lodes, or ledges containing precious metals throughout their entire depth the tops or apexes of which lie within the surface boundaries of the St. Louis Quartz Lode mining claim extended downward vertically, and there is then described the mining claim by reference to the corners and survey calls therefor (Supp. Record).

In paragraph 3 (Supp. Record) an allegation is made as to the ownership of all veins having their tops or apexes within the surface boundaries of the St. Louis mining claim.

Paragraph 4 (Supp. Rec.) alleges the violation of the ownership of the plaintiff by the defendants, it being claimed that the defendants entered upon the property belonging to the plaintiff, and that the defendants entered beneath the mining property claimed or pretended to be claimed by the said defendants, or some of them, and took ore to the value of $200,000, for which judgment was claimed.

The plaintiff permitted its action to lie dormant until the 21st day of November, 1898, when, on its motion, by leave of court, over the objection of the defendants, it filed its

amended complaint (Supp. Record). From this complaint the individual defendants were omitted and the complaint defined with greater certainty and particularity the veins upon which it was alleged the trespass had been committed and the territory upon which it relied for ownership of the ore it sought to recover and the facts raising the federal questions upon which jurisdiction of the United States Circuit Court was based.

On June 26, 1899, the plaintiff filed its second amended and supplemental complaint, upon permission of court granted over defendants' objection, which is the complaint appearing herein (Record, pp. 1-5, both inclusive). In this complaint it is alleged that the plaintiff is the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode mining claim, "and of the quartz, rock and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie *within* the surface boundaries of the said *fractional* portion of said St. Louis Lode mining claim" (Record, p. 2).

From this general claim of ownership and right the plaintiff makes the following exception:

> "Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is designated as follows, to wit:"

Then follows a description of the compromise ground by metes and bounds, concluding as follows, to wit:

> "Including an area of about 12,844 50-100 square feet, *together with all mineral contained therein.*"

It is then alleged that plaintiff in error "is and was the owner of what is known and designated as the Nine Hour

Lode mining claim, situate and being east of the said St. Louis Lode mining claim and including the 30-foot strip or compromise ground aforesaid" (Record, p. 2).

The allegations as to the incorporation and capacity to do business and hold property contained in the original complaint are repeated in this complaint (Record, pp. 1-2).

In paragraph 3 it is alleged that the Montana Mining Company was the owner of the Nine Hour claim, situated east of the St. Louis claim and including the 30-foot strip or compromise ground (Record, p. 3).

In paragraph 4 it is alleged that the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis claim is to the east and dips under and beneath the Nine Hour Lode mining claim, including the 30-foot strip or compromise ground, which said portion of said vein has its top or apex within the St. Louis mining claim, as is then specifically described, beginning at a projected parallel end line of the St. Louis claim at a point on the east line between corners 1 and 2 extended downward vertically, whereat it passes through the hanging wall of said vein at a point from which corner No. 1, being the northeast corner of the St. Louis claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line 5 feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512 7-10 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode mining claim, between corners Nos. 1 and 2, with the west line of the 30-foot strip; thence south 59 degrees 50 minutes west 106 feet and along the west line of the 30-foot strip to a projected parallel end line of the St. Louis claim extended vertically downward,

which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said 30-foot strip.

And, in addition to this allegation, the following:

> "That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim" (Record, p. 4).

The complaint refers to a map or plat showing the point at which the said vein enters the said St. Louis Lode mining claim as described in the complaint, and whereat the same departs therefrom upon the east line of said claim, which is attached to the complaint, marked Exhibit "A," and made a part of the complaint, which is found between pages 4 and 5 of the record.

This allegation shows that apex rights are based upon a vein which crosses the same side line, made up of two lines, of the St. Louis claim, and also claims extralateral rights where only a portion of the width of the apex is contained within the property alleged to be owned by the plaintiff.

THE ANSWER.

To this complaint the defendant, plaintiff in error here, answered (Record, pp. 7-12), admitting the allegations of the first three paragraphs of the complaint and interposing a general denial as to each and every other allegation thereof. The defendant further alleged in its answer that the plaintiff was estopped from claiming any of the mineral found, or which might thereafter be found, in the *30-foot strip* or compromise ground, because theretofore and on or about the 7th day of March, A. D. 1884, one Charles Mayger, who was plaintiff's predecessor in interest, had made, executed, and

delivered to William Robinson, Jasper Huggins, and Frank P. Sterling, who were the predecessors in interest of the plaintiff in error herein, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said compromise ground to the obligees therein named or their assignees, *together with all of the mineral therein contained;* that after the said Mayger had obtained a patent for the said St. Louis mining claim, including said thirty-foot strip or compromise ground, he, the said Mayger, in order to cheat and defraud the defendant, had assumed to convey the compromise ground to the plaintiff, the defendant in error here; that, upon a demand having been made for a deed and refused, the defendant, on or about the 6th of September, 1894, brought an action in the District Court of the First Judicial District of the State of Montana within and for the county of Lewis and Clark, to enforce the specific performance of said bond for a deed; that thereafter such proceedings were had as that on or about the 1st day of June, 1895, judgment was duly entered in favor of the plaintiff therein and against the said defendant, whereby it was adjudged and decreed that the said bond be specifically performed, and that the said plaintiff should make, execute, and deliver to this defendant (the plaintiff in error here) a good and sufficient conveyance, in fee simple absolute and free of all encumbrance, of and for the premises described in said bond and the whole thereof, together with the mineral therein contained; that in pursuance of such decree the plaintiff, on or about the 1st day of July, 1905, had made a deed to the defendant for said premises and for all of the mineral therein contained. A copy of the bond for a deed and a copy of the deed were attached to the answer as exhibits (Record, pp. 7 to 12, both inclusive).

THE REPLICATION.

(Record, pp. 13-15).

The plaintiff, for replication, first denied that it was estopped for any of the causes or reasons set up in defendant's answer, and then admitted that the bond was executed as stated in the answer, as follows:

> "That the said Mayger agreed to convey said thirty-foot strip or compromise ground, with all of the minerals therein contained, to the predecessors in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground except such as is contained in leads, lodes or ledges which have their tops or apexes within the St. Louis Quartz Lode mining claim, exclusive of said thirty-foot strip or compromise ground."

And for further reply the plaintiff alleged that the compromise ground was a portion of the Nine Hour claim, and that no other right or title had been conveyed by reason of said deed than such as was attached and incident to said thirty-foot strip, and that the minerals therein contained were intended to comprise, and did comprise only such minerals as were contained in veins, lodes or ledges having their tops or apexes inside of the thirty-foot strip.

It is then alleged that the compromise ground was at all times a part of the Nine Hour claim, and was never any part of the St. Louis claim, and that this fact was adjudged in the Specific Performance case, which was brought for the purpose of compelling the defendants therein to make a deed for the thirty-foot strip, and that it was found and determined by the court as a matter of fact that the thirty-foot strip was at all times a part of the Nine Hour claim, and that the said agreement, a copy of which was attached to the

answer, was made and given for the purpose of settling, determining, and fixing the boundary line between the Nine Hour and the St. Louis mining claims, the boundaries of which were at the time of the execution of said agreement in conflict.

> "And plaintiff further alleges that the *deed* mentioned in said answer, and a copy of which is annexed, is the *deed* which the court adjudged in said action should be executed for the purpose of performing the agreement above referred to" (Record, pp. 13 and 14).

NEW MATTER IN REPLY AT ISSUE.

At the time this reply was filed the following section of the Code of Civil Procedure of the State of Montana was, and yet is, in force, to wit:

> "SEC. 754. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party."

Upon these issues this cause was first tried before District Judge Hon. Hiram Knowles and a jury, in the United States Circuit Court for the District of Montana, commencing on the 8th day of August, A. D. 1899. After the jury had been empanelled the defendant objected to the introduction of any testimony on the part of the plaintiff, for that the second amended and supplemental complaint, which had been theretofore read to the jury, did not state facts sufficient to constitute a cause of action and did state facts showing that the plaintiff had no cause of action. The court overruled such objection and permitted the plaintiff to offer testimony;

to which ruling of the court the defendant then and there duly excepted. (See Transcript of Record, October term, 1901, No. 213, p. 16.)

Thereafter such proceedings were had in said action as that, the jury having found a verdict against this defendant, a judgment was, on or about the 16th day of August, 1899, entered against the defendant in the sum of $23,209, with costs.

The defendant therein (plaintiff in error here) sued out a writ of error to remove the said cause into the United States Circuit Court of Appeals for the Ninth Circuit; and thereafter such proceedings were had in the said Circuit Court of Appeals as that the said court, on or about the 14th day of May, A. D. 1900, affirmed said judgment in all things (102 Fed. Rep., 130).

The said Circuit Court (Rec. Oct. Term 1901, No. 213, p. —) on the trial of said cause having limited the plaintiff to proof of damages to such ores as were mined out of the compromise ground north of its 108-foot plane, which was a projected line drawn down parallel to what were claimed to be the end lines of its St. Louis claim at the point where the hanging wall of the lode crossed the westerly side line of the compromise ground, and having refused to permit it to prove damages for ores mined out of said compromise ground southerly of said 108-foot plane and between that point and what it termed its 133-foot plane, which was likewise a projected line drawn down parallel to its claimed end lines at the point where the foot wall of said vein crossed the westerly side line of the compromise ground, the plaintiff having previously settled a bill of exceptions, on or about the 29th day of January, A. D. 1900, sued out a writ of error to remove said cause into the Circuit Court of Appeals for the Ninth Circuit for review upon its bill of exceptions, all of which will more fully appear, reference being had to the Transcript of Record in Cause No. 214 of the October term, 1901, of this court.

Such proceedings were had in said cause in said Court of Appeals as that, on or about the 8th day of October, 1900, it was therein adjudged "that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to said Circuit Court for a new trial as to damages alleged and recovery sought for the conversion and value of certain ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes." (Rec. in 214, Oct. Term, 1901, p. —.)

THE CASE IN THE SUPREME COURT.

The Circuit Court of Appeals affirmed the judgment of the Circuit Court upon plaintiff in error's writ of error, and while it had reversed the same judgment on the writ of error sued out by the defendant in error remanded the case for a new trial as to damages alleged and recovery sought "for the conversion and values of certain ores taken from the Drumlummon vein on its dip between the planes designated as the 108 foot and 133 foot planes." The judgment entered was to stand, and in case the jury returned a verdict in the St. Louis Company's favor, it was to have a new and second judgment in the same case for the ores mined out between the two planes. After vainly trying by motions for rehearing and petitions to correct what plaintiff conceived to be erroneous action on the part of the Circuit Court of Appeals in this cause, and otherwise to secure relief in the Court of Appeals, the plaintiff in error sued out a writ of error upon each of said decisions to this court. It was manifest that if the plaintiff in error permitted the case to go back to the Circuit Court for new trial and an additional judgment, as was ordered by the Circuit Court of Appeals, it would thereby lose, as a result of the lapse of time, its right to have the first judgment, which stood affirmed by the Circuit Court of Appeals, reviewed by this court. Upon the theory that the

judgment entered on the writ of error sued out by plaintiff in error, by virtue of its affirmation by the Circuit Court of Appeals, was final, and that some method must be found in this court of reuniting the cause, which had thus been separated, by consolidating the segment which had been split off by the writ of error sued out by the defendant in error, and which had become a part of the case in the records of the Court of Appeals, with the portion of the case wherein there was a judgment standing against the Montana Company, the plaintiff in error sued out a writ of error from this Court to the Circuit Court of Appeals in both cases. The decision of this court on these two writs of error is reported in 186 U. S., 24, and therein this court declined to pass upon the merits of the controversies involved in the litigation, but held that the Circuit Court of Appeals, in granting the new trial to the defendant in error, had vacated the judgment it had affirmed upon the writ of error prosecuted to that court from the Circuit Court by the Montana Company, and therefore there was no final judgment from which a writ of error could be prosecuted to the Supreme Court from the Circuit Court of Appeals.

REMANDED TO COURT OF APPEALS.

A mandate from this court having been filed in the Court of Appeals, motion made by the plaintiff in error to reunite the case and remit it to the Circuit Court for a new trial by a single remittitur. On this motion, the Court of Appeals, on the 8th day of October, 1902, after reciting the two former judgments entered an order as follows, to wit:

> "It is now ordered and adjudged that the judgments as heretofore made and entered be *vacated* and *set aside*, and in lieu thereof it is ordered and adjudged that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with costs, and that the cause be remanded to said Circuit Court for a new trial" (Record, p. 19).

THE RETRIAL.

On the retrial of the case before Judge William H. Hunt and a jury, while the trial court would not and did not in terms hold that it was in strictness bound to apply the doctrine of *"the law of the case,"* yet it held that it was showing only proper respect for the opinions of an appellate court to follow such decision, whether they were or were not *"the law of the case"* (Record, pp. 23, 24, 25, 55, 56, 57). Not only did the court apply the doctrine of "the law of the case" to the plaintiff in error with the greatest strictness, confining its decisions, both as to law and fact, to what was found decided in one or the other of the opinions of the Court of Appeals or referred to therein as a fact, but went much further, following what it assumed was the spirit of those decisions.

The plaintiff (defendant in error here) was by the trial court permitted to introduce evidence in support of its contention with reference to the case, additional to that which had been introduced in the former trial, and upon points not covered thereby, while the defendant (plaintiff in error here) in every instance was limited to what the record showed to have been the evidence on the former trial of the case, the court proceeding evidently upon the idea that while the plaintiff in the court below was at liberty to introduce evidence to support its contentions, the plaintiff in error (defendant there) was not permitted to introduce evidence to show a different state of facts from that which had been disclosed in the record before the Circuit Court of Appeals when the new trial was granted, and contradicting the facts upon which certain conclusions were therein drawn, or showing their non-existence, or to contradict the things proved or attempted to be proved for the first time by the plaintiff in its evidence in the second trial, or to disprove things which the plaintiff had been permitted to prove in the former trial, and was permitted again to introduce evidence in support of at the second trial (Record, pp. 55-58).

As illustrating what we mean, we call attention to page 52 of the record, where the plaintiff was allowed to introduce records in other suits, not at all connected with the case then on trial. The defendant, however, on the other hand, was held down with unrelenting strictness to the former record, as, for example, when it offered the original complaint in the Adverse claim suit (Record, p. 65), it was rejected, and in some instances evidence that had gone in before was rejected when objected to by counsel for the plaintiff (Record, p. 77). We call attention to these, and might call attention to many more, as tending to show that on the retrial the doctrine of "the law of the case" was applied with more than usual strictness.

THE SPECIFIC PERFORMANCE CASE.

The judgment roll in the Specific Performance case appears in the record here, pages 41 to 54, both inclusive. From the judgment in this case the defendant in error prosecuted an appeal to the Supreme Court of the State of Montana, which approved the judgment of the District Court and the opinion in the case will be found reported in the 20 Mont., 394. From the judgment affirming the decree of the court below the defendant in that case (the defendant in error here) sued out a writ of error and brought the judgment into this court and this court affirmed the judgment of the Supreme Court of Montana (171 U. S., 650).

In this connection we call attention to the position on the part of the defendant in error as to the exact *status* of the compromise ground. In the bond for a deed (Record, p. 10) it is referred to as "comprising a part of two certain quartz lode mining claims known as the St. Louis Lode claim and the Nine Hour Lode claim." In the answer in the Specific Performance case (Record, p. 46) it is averred "that the same was and is a part of the St. Louis Lode

mining claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant Charles Mayger, for said St. Louis Lode mining claim;" and the answer, after denying that Mayger had wrongfully or otherwise extended the easterly line of the St. Louis over the Nine Hour claim, avers by way of an admission "that he caused a survey to be made of the same and averred that the boundary lines of said St. Louis mining claim, *as originally located*, included and embraced the said *locus in quo* and every part thereof at and prior to the location of the said Nine Hour Lode mining claim."

In the complaint in the case at bar (Record, p. 1) the compromise ground is found embraced in the general description of what is the St. Louis lode, and in describing the compromise ground (Record, p. 3) we find this language, viz: "which said fractional portion of said *St. Louis Lode mining claim* is described as follows, to wit."

Notwithstanding this, we find it alleged in the replication (Record, p. 14) that the compromise ground "comprised a part and portion of what was known as the Nine Hour Lode claim;" and again:

> "And plaintiff alleges the fact to be that the said thirty-foot strip, or compromise ground was at all times a part and portion of the quartz lode mining claim, known as the Nine Hour mining claim, and that the same was never a part or portion of the St. Louis Quartz Lode mining claim mentioned in the complaint herein."

And all of these pleadings were verified by the same person, who is now and at all times since its organization has been the general manager of the defendant in error. In view of the noticeable uncertainty of the defendant in error as to what the real *status* of the compromise ground is, we beg to most respectfully suggest that it ought not to feel aggrieved if this honorable court should find it either the one or the other, as the ends of justice might require.

MATERIAL FACTS ESTABLISHED BY THE TESTIMONY.

We purpose calling attention to a few significant facts appearing in the record, and in doing so we will refer to the proof offered by the plaintiff in error and rejected by the court, precisely as if the several witnesses had been allowed to testify to the matters we were offering to prove by them. On a review of the case of this character, the evidence offered, so far as it is relevant and material to the issues and which should have been admitted, ought to stand and does stand on exactly the same plane as that of the evidence actually given.

a. The St. Louis was originally the "Ivanhoe." The relocation of the ground as the St. Louis was made by Charles Mayger, by direction of his brother William Mayger, on or about September 28, 1898 (Record, p. 26). This relocation having been made before the year expired for the performance of the annual labor required of the owners of the Ivanhoe, the conclusion may logically be drawn that in making this location Mr. William Mayger, in miners' parlance, "*jumped the Ivanhoe.*"

b. That the "discovery shaft" of the St. Louis is that shaft which is marked on the map (Plaintiff's Exhibit 1) as the 65-foot shaft, and that the discovery vein at the St. Louis was the small vein appearing a few feet below the bottom of this shaft (Record, p. 26).

c. That the St. Louis claim was intended to be fifteen hundred feet in length by six hundred feet in width; that it was a parallelogram, having four corners and no more, and that its easterly and every other boundary was, and was intended to be, a straight line (Record, p. 38).

d. That the location was not made along but diagonally across the claim as staked; that if it continues in its own direction the discovery vein of the St. Louis would pass out of the easterly boundary line of the location between survey corners Nos. 1 and 2, about 590 feet south of corner No. 1; that at the other end it falls into the Transcontinental fissure and is lost, or if it continues it is found in an undeveloped fissure on the southwesterly side of the tunnel and 15 or 20 feet out, or westerly, from the point where the St. Louis discovery vein drops into the Transcontinental fissure (Record pp. 79, 71, 72).

e. That though Mr. William Mayger had been a part owner in the "Ivanhoe," when the ground was relocated by his brother Charles Mayger as the St. Louis he had no interest in it (Record, pp. 26, 27); yet he paid the expense of fighting the Adverse Claim suit and of patenting the ground; that he organized the defendant in error, the St. Louis Mining and Milling Company of Montana, and that after putting $125,000 of the capital stock into the treasury the remainder of such capital stock was divided equally between himself and his brother Charles (*ibid.*).

f. That when William Robinson afterward discovered the Nine Hour he knew where the easterly side line of the St. Louis was; that it was a single straight unbroken line from the northeast corner stake (now survey corner No. 1) to the southeast corner stake of the said claim; that in staking the Nine Hour he so set the northwest and the southwest corner stakes of his Nine Hour claim as to leave an open unclaimed strip of ground between the westerly line of his Nine Hour and the easterly line of the St. Louis, which strip at the north end of his Nine Hour was fifty (50) feet in width and was twenty-five (25) feet in width at the south end of the St. Louis, and that the stakes so originally set by him for the purpose of marking said westerly line were never thereafter changed (Record, pp. 60, 63, 64).

g. That there was no conflict of the surface boundaries of the two claims until a short time prior to the survey of the St. Louis for patent; that just prior to such survey the southeast corner stake of said St. Louis was secretly, wrongfully, and fraudulently moved about four hundred (400) feet further up the mountain and to a point near the easterly line of the Nine Hour where no stake had ever stood before. (Record, pp. 60, 64.)

h. That when Mayger made his survey for patent he started at the northeast corner of his St. Louis claim and ran in the direction of the stake which had been fraudulently placed on the Nine Hour claim until he reached a point which is now corner No. 2 of his survey, at which point he caused a mineral corner to be put in at a point where there never had been a stake or monument before; there, turning an angle to the right, or westerly, he ran to what is now corner No. 3 of his survey, and which point was on the defendant's Nine Hour claim, and at corner No. 3 put in a corner where there had not been any corner of a mining claim theretofore. (Record, pp. 60, 61.)

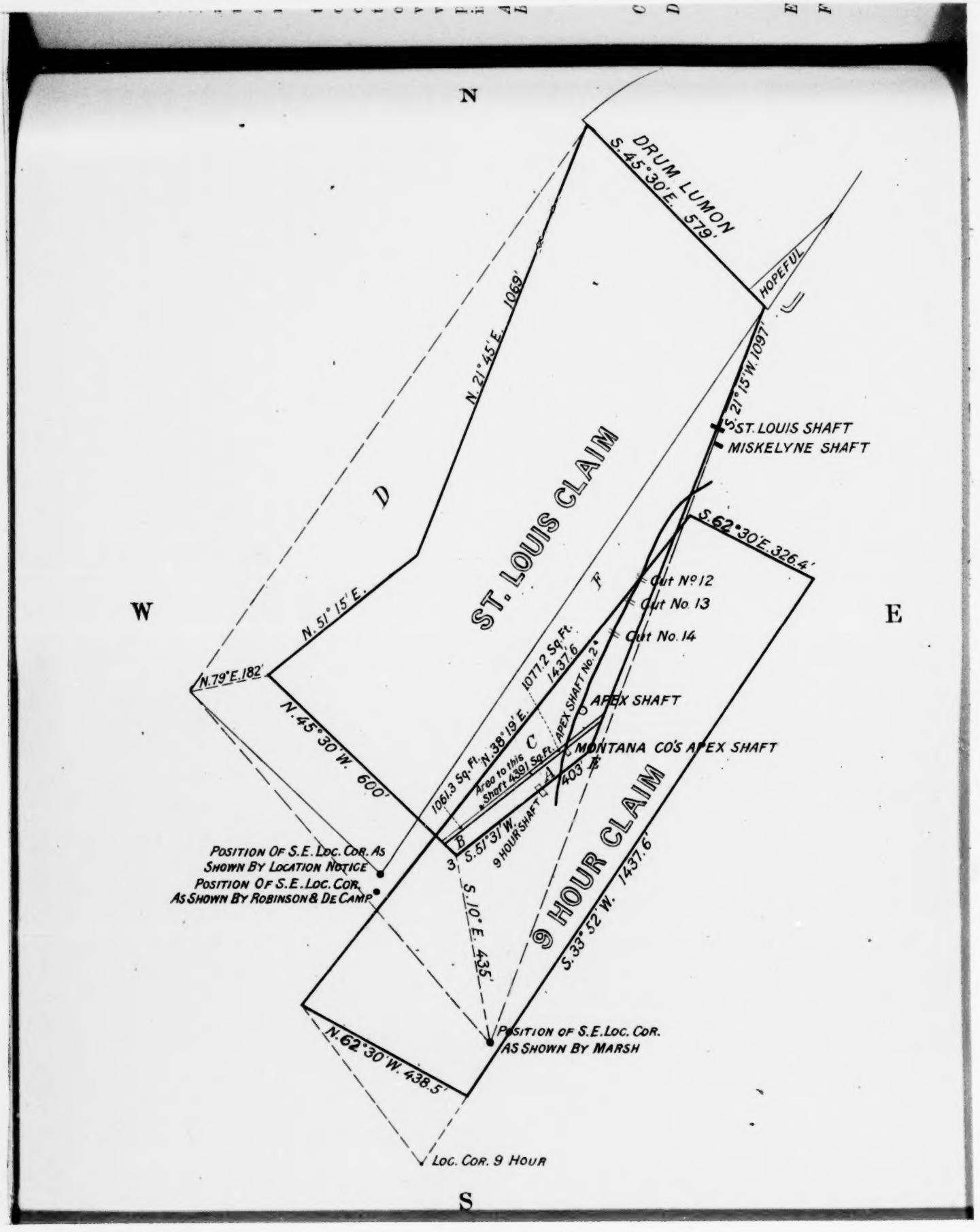
i. That by the unlawful extension of the east side line of the St. Louis over said Nine Hour surface the said line was made to run between corners Nos. 2 and 3 thereof within ten and one-half feet of the center of the Nine Hour discovery shaft, and there was wrongfully included in such St. Louis survey 1.98 acres of the surface of said Nine Hour (Record, pp. 55, 59, 65; plat opposite p. 76; map, Exhibit E, p. 55).

j. That thereafter, and upon the said Mayger filing an application to enter the St. Louis claim as so surveyed, the said William Robinson, Warren De Camp, John W. Eddy, and Frank P. Sterling, owners of the Nine Hour, filed an adverse claim in the United States land office wherein such

application was made, and thereafter and within the time allowed commenced an action in the District Court of the First Judicial District of the Territory of Montana within and for the county of Lewis and Clark, to determine who was entitled to the possession of the area (1.98 acres) so in conflict, as aforesaid; that thereafter and on or about the 7th day of March, 1884, the said adverse claim and suit was settled between the parties by the making, execution, and delivery of the bond appearing on page 9 of the transcript of record herein. At and prior to the execution and delivery of said bond it was expressly understood and agreed between the parties that in consideration of their giving up the ground in conflict, outside of the 30-foot strip, they were to have all of the ores and quartz rock that laid under the surface of the compromise ground regardless of where the apex of the vein in which such ores were found might be (Record, p. 60); that it was talked over and distinctly agreed that apex rights should be cut off, and Mayger agreed to forego all extra-lateral rights in the part of the premises to be conveyed (Record, p. 62).

k. That by evidence offered, but which the defendant was not permitted to introduce and which the record therefore does not contain, it would have been established that Mr. Mayger has beaten the owners of the Nine Hour out of a strip of ground nine and one-half (9½) feet in width. The bond (Record, p. 10) calls for a starting point of survey fifty (50) feet distant from the center of the Nine Hour discovery shaft. The actual point where the survey was started was 40½ feet from the center of discovery shaft, or 10 feet 6 inches to the easterly line and thirty (30) feet to the westerly line of the compromise ground (Record, p. 55).

l. Mr. Mayger and the defendant in error have repudiated or sought to repudiate every contract, whether oral or written, that it ever made with the Nine Hour owners, for while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S. 62° 30' E. 326.4'
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N. 45° 30' W. 600'
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POSITION OF S.E. LOC. COR. AS SHOWN BY LOCATION NOTICE
POSITION OF S.E. LOC. COR. AS SHOWN BY ROBINSON & DE CAMP
S. 10° E. 435'
9 HOUR CLAIM
S. 33° 52' W. 1437.6'
POSITION OF S.E. LOC. COR. AS SHOWN BY MARSH
N. 62° 30' W. 438.5'
LOC. COR. 9 HOUR

admitting the execution of the bond for a deed, it pleads, and he verifies the pleading, "that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis mining claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid," and he prays that the same may be decreed to be null and void (Record, pp. 48-49).

On the opposite page will be found a diagram or map of the two claims, which may serve to give a clearer impression of the situation than can be obtained from the text. It was originally made from a photograph of the surface map of the plaintiff in error herein, marked Exhibit "E," and one of the maps accompanying the record herein. This map was made by Mr. John H. Farmer, a mining engineer, and was introduced in evidence on the trial of the case (Record, p. 55). We make the following explanation of what is indicated by the several letters found upon the map:

A is the Nine Hour Discovery shaft.

B is the compromise ground, between corners Nos. 2 and 3 of the St. Louis claim. The western line shown is where the line would have been had the survey been started in accordance with the terms of the bond, at a point at right angles to the St. Louis line between corners Nos. 2 and 3 and 50 feet distant from the center of the Nine Hour discovery shaft.

C is the conflicting area between the Nine Hour and the St. Louis.

D shows the St. Louis as originally staked and described in its location notice, the straight dotted line lying to the west of its present westerly boundary line being the original west line of the St. Louis and the southwest corner as shown thereon being the same corner shown in the diagram annexed to the patent of the St. Louis and marked in such diagram "Loc. Cor."

E is the southeast corner stake of the St. Louis after its removal onto the Nine Hour ground.

F is the unclaimed area between the two claims left when the Nine Hour was located.

In the first trial of this case the Circuit Court permitted the defendant in error, The St. Louis Company, to assert, rely upon, and receive judgment upon the theory and claim that it had the apex of ore bodies contained beneath the surface of the 30-foot strip of ground which is described in the second amended complaint at page 3 of the record and indicated upon the plat, Exhibit "A" to said complaint, inserted between pages 4 and 5 of the record, and which said 30-foot strip or compromise ground had been patented to the St. Louis Company as a part of the St. Louis claim, by virtue of an apex claimed to exist within that portion of the ground in conflict between the Nine Hour claim and the St. Louis claim which was retained by the St. Louis Company. This was done upon the theory that notwithstanding the fact that the ground had been patented to the St. Louis Company as a part of the St. Louis claim, and it had deeded the same to the Montana Company, owner of the Nine Hour claim, under the provisions of a compromise contract between the owners of the Nine Hour claim and the St. Louis claim, by which it was agreed that the Nine Hour claimants should dismiss an adverse suit which they had filed, that the St. Louis claimants should patent the ground in conflict between the Nine Hour and the St. Louis claim and convey the 30-foot strip to the owners of the Nine Hour claim, the grantor might assert apex or extralateral rights against his own grant, as provided for in the compromise agreement, in the decree of the District Court of Montana, finally affirmed by the Supreme Court of the United States, and by the deed which was in fact delivered to the Montana Company by the St. Louis Company. This attempt and this action was resisted by the Montana Company, which claimed that it had a contract which provided that the St. Louis Company should patent the ground as a part of the St. Louis claim, and after patent therefor had been obtained should convey the described premises and by said conveyance grant to the Montana Company all the ores which were found beneath the surface thereof, being the very

ores for which the said defendant in error sought to recover upon the alleged ownership of an apex thereto; that the Nine Hour claimants had contracted, as a consideration for a surrender of their larger claim, for this grant, and that the defendant in error was estopped by its contract, the judgment of the District Court of Montana, and its deed from asserting any title to that which it expressly conveyed, and that the Circuit Court of Appeals, when it affirmed this decision of the Circuit Court, in effect, as is claimed and contended by the plaintiff in error, took from the plaintiff in error that which was expressly conveyed to it by the deed which it had therefor. The Circuit Court of Appeals rendered this decision upon the doctrine, as announced by it in 102 Fed., 432, that in interpreting the conveyance in question regard should be had not only to its terms, but to the subject-matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. This theory was combated and is combated by the plaintiff in error, which maintains that the deed and as well the contract providing for it are plain, explicit, and direct; so that there is neither required nor permitted any investigation into surrounding circumstances for the purpose of ascertaining the meaning thereof, which is in no doubt, confusion, or uncertainty whatever.

The Circuit Court of Appeals also in its opinion proceeds upon the theory that the purpose of the settlement and deed was only to fix a surface line between the two claims, and did not deprive the grantor of any extralateral rights to ore under the ground so conveyed, whereas in fact, as the plaintiff in error contends, an adverse suit had been brought to recover all the ground in conflict between the two claims, and what was done was to make a compromise and an agreement that the specific territory, together with all the ore in it, wherever the apex thereof might be, should be conveyed to the plaintiff in error, and that the purpose was not simply to find a surface dividing line, but to dispose of the valuable portion of the controversy, the ore in the ground in dispute.

The Circuit Court of Appeals held that the controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only, whereas the purpose, as plaintiff in error maintains, was to substitute an agreement of the parties in which mutual concessions were made, in lieu of a determination of the ownership of the surface and the ore and of all rights attached thereto, which would have been reached by a trial of the adverse suit over a conflict in the two claims, in which the Nine Hour claim asserted title to the territory which included the apex upon which the defendant in error now relies, as well as the 30-foot strip it agreed to convey. The plaintiff in error contends that the ownership of the property and that which it contained, and not merely its surface, was involved in the adverse suit.

It is further held by the Circuit Court of Appeals that the compromise was an admission that the Nine Hour claim was just, and upon this holding the court bases in part its decision; whereas the plaintiff in error maintained at all times, and does now, that the owner of the St. Louis claim did not concede that the Nine Hour claim was right or that its claim was just, but that the disputants agreed, in settlement of the controversy, the St. Louis Company should convey, as was provided in the contract, the ground described and all ore in it, in consideration of being relieved from the larger claim, as to territory and the ore contained in it, made by the Nine Hour claimants in the adverse suit.

The Circuit Court of Appeals also bases its decision upon the idea and statement that the conveyance was for all the ground in dispute between the Nine Hour and St. Louis claims, and that unless the St. Louis claim, notwithstanding its contract and deed, should be permitted to apex the ore bodies found beneath the ground it had conveyed, and which by the terms of its deed it conveyed, it would be conveying more to the owner of the Nine Hour claim than it would have secured had it in fact patented as a part of the Nine

Hour claim all the ground in conflict; for it is assumed by the court as the basis of this decision that the apex upon which the defendant in error relies is contained in territory which was not in conflict between the Nine Hour and St. Louis claims. The plaintiff in error, while not conceding that these matters may be entered into, since it contends that the deed is explicit upon that subject, yet asserts and contends that if the surrounding circumstances and the nature of the property are to be considered, then it must be taken into consideration that the court erred in the assumption of fact upon which it proceeded, upon the existence of the circumstances which it assumed surrounded the contract and the deed, and points out in support thereof that in fact the ground deeded is not all the ground which was in conflict between the two claims, and that if in fact the Nine Hour claim had patented all the ground in conflict it would have patented all the apex upon which the defendant in error relies in this litigation.

The Circuit Court of Appeals further holds, with reference to the ore beneath the surface of the 30-foot strip between the 103 and 108 foot planes, that the ground deeded by the St. Louis Company to the Montana Company is junior in date to that portion of the conflict or that territory retained by the St. Louis Company, and therefore, notwithstanding the apex is a divided one, and is not within the territory owned by the defendant in error, it may take the entire width of the vein, beginning on the surface, from the point where it has no apex whatever to the point where it has all the apex, and goes back of the patent and the contract to impress upon the deeded property inferior and junior character as a portion of the Nine Hour claim, while conceding and assuming to the retained property a priority of location as a part of the St. Louis claim.

The plaintiff in error denies the legal right of the court, upon a proper construction of the United States statutes concerning the patenting of claims, to go back of the patent

to ascertain the supposed different ages of portions of the same claim conveyed by the Government by the same patent; denies the right of the court and the defendant in error to go back of the contract and the deed, which recognized no such distinction, but provides for the grant and conveys the territory as a portion of the St. Louis claim under its patent, with all the rights which inure thereto, and which rights and conveyance were accepted in consideration of the surrender, under the compromise, of the larger claim made by and on behalf of the Montana Company as the owner of the Nine Hour claim. Plaintiff in error also claims that in addition to the fact that the defendant in error, within the territory it retained, does not have the apex, but only a part of it, and may therefore not assert extralateral rights with reference to it, under all the circumstances, and with a presumed knowledge of all the legal propositions announced by the court, it or its grantor agreed to convey and it did convey the territory described and all the ore and mineral contained therein, referring to and relying upon the language of the conveyance adjudged to be made to the plaintiff in error by the defendant in error, and which is in the following language (Record, p. 11):

> "Has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release, and forever quit-claim unto the said party of the second part and to its assigns forever, all and singular those certain mining premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit: (Here follows description of the 30 foot strip) to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or ap-

purtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, in or to the said premises, and every part and parcel thereof, with the appurtenances."

In the second trial, notwithstanding the ore was mined from beneath the surface of the ground which the defendant in error had conveyed to the plaintiff in error by the clause of the deed and under the description just stated, the Circuit Court virtually held that the existence of the suit made the plaintiff in error a willful trespasser and entitled the defendant in error to recover punitive damages against it for the ore mined, notwithstanding the plaintiff in error relied, as it did, in good faith upon the conveyance to it of this ore and its consequent ownership thereof, and the Circuit Court of Appeals affirmed a decision based upon an instruction of this character by the Circuit Court to the jury, and the Circuit Court held that the burden was upon the plaintiff in error to establish its right to the ore, instead of leaving the burden of proof upon the defendant in error, which asserted title to the ore which it had conveyed and which was beneath the surface of a claim owned by another, and this holding of the Circuit Court was approved by the Circuit Court of Appeals.

There are other contentions of importance in this case which require the construction of the federal statutes relating to the mineral lands of the United States in their determination, and others which require the application of rules of law which are exhibited in the assignment of errors and in the argument and for that reason are not in this statement specifically set forth. The purpose of this statement is to give to the court a general idea of the nature and

history of the litigation, the questions involved, and the decisions made with reference to them.

The facts, as the plaintiff in error offered to prove them and as by the proof offered and the proof introduced would have been shown, are that the St. Louis Mining claim as located did not cover the territory afterwards in conflict between the St. Louis claim and the Nine Hour claim, and the conflict which was created arose from the fact that after the Nine Hour claim had been located at some distance from the St. Louis claim, as it existed at the time of the location of the Nine Hour claim, with considerable unoccupied territory between the two locations, the position upon the ground occupied by the St. Louis claim was changed so as to include the unoccupied territory which theretofore intervened between the St. Louis claim and the Nine Hour claim, and also a portion of the Nine Hour location, being that for which the adverse suit was instituted. The plaintiff in error contended and contends that if the defendant in error should be permitted to go outside of or behind the patent issued for the St. Louis claim, or outside of or behind the deed made to the plaintiff in error by the defendant in error under the duress of the decree of the District Court of Lewis and Clark county, based upon the contract of compromise and adjustment, and to go back of the terms of that written contract, as was done in the introduction of evidence, the instructions to the jury at both trials in the Circuit Court, and by the Circuit Court of Appeals in reaching the conclusions upon which it decided that the defendant in error could assert extralateral rights to the ore contained within the compromise ground or 30-foot strip by virtue of an apex contained within that portion of the St. Louis claim which the defendant in error retained, then the plaintiff in error should have been permitted to add to the evidence in the record upon that fact the conclusive proof that the St. Louis claim, as to all the territory in conflict between it and the Nine Hour claim, and as to the unoccupied ground between

the two claims when the Nine Hour claim was located, was junior in location to the Nine Hour claim; that the territory in conflict between the two claims, and the respective assertions of title to which were adjusted by the give-and-take proposition embodied in the contract of compromise and which led to the decree and deed of conveyance, was greater in area than the compromise or 30-foot strip, and that if the plaintiff in error, as the owner of the Nine Hour claim, or its grantors, had proceeded with the adverse suit and succeeded therein, the Nine Hour claim would have included in its patented area the entire conflict, or 1.98 acres, within which lies, as disclosed in the evidence, all the apex of the Drumlummon vein upon which and by virtue of the ownership of which defendant in error asserted ownership in the ore and vein in question; that this might be proved as showing the circumstances surrounding the making of the contract and the nature of the property involved in the controversy and in the adjustment of the controversy, and that the express understanding of the parties, as well as the express terms of the contract, negatived the construction put upon the contract and the conveyance by the Circuit Court and the Circuit Court of Appeals through the importation into the case of assumed surrounding circumstances which plaintiff in error contends did not warrant this interpretation of the contract, and in fact did not exist, for the plaintiff in error sought to introduce evidence to prove that the understanding of the parties and the condition upon which the settlement was made were that the plaintiff in error should receive a conveyance of the ground called the 30-foot strip, including therein all the ore, mineral, lodes, and veins, whether the apex was within that territory or not, and that the added words, "together with all the mineral therein contained," were inserted to make sure of the accomplishment of this purpose. The plaintiff in error has contended though that if the courts could go or permit the jury to go beyond the unequivocal and unambiguous language of the

deed, then all the circumstances and facts surrounding and connected with the controversy and transaction were material and should be admitted in evidence in order that the purpose, construction, and interpretation of the deed should be made in the light of all and the real facts and circumstances and not in the supposed light of a part of the facts and of assumed facts which did not really exist.

ASSIGNMENT OF ERRORS.

The plaintiff in error will rely for a reversal of the judgment in this action upon the following assignments of error:

I.

The Court of Appeals for the Ninth Circuit erred in holding that it was bound by the opinions rendered by it and reported in the 102 Federal Reporter, page 430, and the 104 Federal Reporter, page 664, for that judgments which were rendered in pursuance of said opinions and which gave binding force to the same were vacated and set aside by the judgment of the said court rendered October 8, 1902.

II.

That there was error in said opinion and judgment so rendered, as aforesaid, in that it was held, upon the strength of the two former opinions in this cause, that the second amended and supplemental complaint, being the complaint upon which this action was tried, did state facts sufficient to constitute a cause of action and did not state facts showing that the plaintiff therein (the defendant in error here) had no cause of action.

III.

Error was likewise committed by said Court of Appeals in its opinion and judgment aforesaid in holding that the Cir-

cuit Court of the United States for the Ninth Circuit, District of Montana, did not commit error in permitting testimony to be given on the trial of said cause as to the existence of a discovery vein in the St. Louis Lode mining claim and as to the strike and dip of said vein, no allegations with reference to such vein or its dip or strike being made in the complaint or in anywise being in issue in said action.

That the said Circuit Court of Appeals erred in holding that the Circuit Court aforesaid did not commit error—

(*a*) In permitting the witness, William Mayger, to testify in answer to the following question:

"Q. Which direction does it run?"

To which question the plaintiff in error objected on the ground that the same was irrelevant and immaterial, for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relative to the strike or dip thereof.

(*b*) The Court of Appeals also erred in holding that the said Circuit Court did not err in permitting the said witness to testify that the St. Louis discovery vein ran very nearly parallel with the side lines of the St. Louis as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end and within 400 feet of the north end.

(*c*) In holding that there was no error in permitting the witness, Walter Proctor Jenny, to testify as follows:

> "I have examined the discovery vein of the St. Louis Lode mining claim. Its course is substantially northeast and southwest. Explorations under ground show that it lies within 750 feet of the north end line and in the south end it is traced within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85° to 90° easterly."

The plaintiff in error having objected to said testimony and to the question eliciting the same, for that the strike and dip of said discovery vein was not in issue.

(*d*) Error was likewise committed in permitting the witness, John R. Parks, to testify as follows, to-wit:

> "The discovery vein of the St. Louis is a gold-bearing fissure vein running in the general direction of the side lines; the vein is developed both northerly and southerly from the Transcontinental tunnel."

The said testimony and the questions in answer to which the same was given having been objected to by the plaintiff in error for the reasons aforesaid.

(*e*) The Court of Appeals also erred in holding that the Circuit Court did not err in permitting all of the other testimony shown in the record relative to the discovery vein of plaintiff's St. Louis mining claim and its strike and dip and permitting the same to be received in evidence over the objections of the plaintiff in error thereto.

IV.

The Court of Appeals likewise erred in holding in and by its decisions aforesaid that a mineral-bearing vein the apex of which enters and departs through the same side line of a mining claim has or can have extralateral rights under the mining laws of the United States.

V.

The Court of Appeals likewise erred in holding by its judgments and opinions aforesaid that the St. Louis Mining and Milling Company of Montana was not estopped by the bond for a deed given by its predecessor in interest, the judgment rendered against it by the District Court of the State of

Montana within and for the County of Lewis and Clark, wherein the said St. Louis lode is located, in the Specific Performance case, and by its deed made under and in pursuance of the decree rendered in that case, from claiming any right to mineral contained in the thirty-foot strip or compromise ground, and this without reference to whether the lode in which such mineral was found had its apex within or without the said thirty-foot strip or compromise ground; and it further erred in holding that the said defendant in error was not expressly enjoined and restrained from claiming any right, title, or interest in or to such mineral or any part or portion thereof.

VI.

The Court of Appeals aforesaid also erred in holding in and by its opinions and judgments aforesaid that the said defendant in error was entitled to pursue the Drumlummon vein on its dip downward between its so-called 108 and 133 foot planes; and it erred in holding that the Circuit Court for the District of Montana did not err in permitting the witness, William Mayger, to testify as to the ground which had been stoped out by the plaintiff in error northerly of its so-called 133-foot plane, and to point out to the jury on plaintiff's Exhibit No. 1 where he claimed such stoping to have been done.

(*a*) Error was committed by said Court of Appeals by holding that said Circuit Court did not err in permitting the said witness to answer the following question, to wit:

> "Q. Point out to the Jury, westerly of the 133-foot plane, where the stopes have been taken out?"

(*b*) And in permitting the said Mayger, over the objections of the plaintiff in error, to testify as follows, to wit:

> "The entire vein is stoped out between the 108 and the 133-foot planes from the surface to the 190-foot level of the Montana Company's works."

(c) In permitting the witness Parks to testify, over objection, as follows:

> "I have block No. 1, the stope south of the north line of the Montana Company's apex shaft to the 133-foot plane and from the surface to the instrument at 'K.' It lies entirely within the boundary of the compromise ground extended downward vertically. The block has an average width of seven feet, is 21 feet long and 36.3 feet high."

Also in holding that it was not error to receive the testimony of witnesses, as shown by the record, with reference to blocks 2, 3, 5, 6, and 7, all of which, as is shown by the testimony, lie wholly within the compromise ground and between plaintiff's so-called 108 and 133-foot planes; for that all of said testimony was objected to by plaintiff in error and was inadmissible, for the reason that the defendant in error did not have the whole of the apex of the Drumlummon vein within the surface boundaries of its claim beyond its so-called 108-foot plane, and that permitting it to pursue the vein between the two planes was a taking of the vein on its strike and was an unlawful interference with and an appropriation of 168 square feet of the surface of the compromise ground, property of the plaintiff in error.

VII.

The Court of Appeals erred in holding that the Circuit Court aforesaid did not err in sustaining objection to the following question asked of the witness, John H. Farmer, by plaintiff in error, to wit:

> "Q. Draw a line at right angles to that one (indicating the east line of the compromise ground) 50 feet from the center of the discovery shaft, on the Nine Hour where would it bring it on the map, that is, from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2, and 3 of the St. Louis."

Said witness having testified that he was a mining engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

VIII.

The Court of Appeals erred in its holding that the Circuit Court did not err in refusing to permit the witnesses John Langan, William Robinson, Warren De Camp, F. P. Sterling, J. W. Eddy, and Joseph K. Toole, witnesses for plaintiff in error, to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof, what it expected to establish by the testimony of each of said witnesses, severally.

IX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the defendant to call to the witness stand John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim suit brought by the owners of the Nine Hour against the St. Louis claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented an area of 1.98 acres; that he had platted the area in conflict on the map (Defendant's Exhibit "E"), and that it included the 30-foot strip or the compromise ground.

X.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by plaintiff (defendant in error here) and in refusing to permit the defendant (plaintiff in error here) to prove by the witness, William Robinson, present in court, that he was the person who located the Nine Hour claim and the representa-

tive of his co-owner when the settlement of the adverse suit was made; that the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"), and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres; that the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner De Camp, was that he was to retain the right to the ore beneath the compromise ground without regard to where the apex of the lode was in which said ore might be contained; that it was arranged with William Mayger, representing Charles Mayger, that the Nine Hour claimants were to have the 30-foot strip and "all of the mineral therein contained," without regard to where the apex of the lode might be in which such mineral was contained; that this was a distinct understanding of the parties before the bond (Defendant's Exhibit "A") attached to its answer was drawn up; that said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger; that the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owners all of the mineral contained in said compromise ground, regardless of where the lead in which it was found might have its apex; that he knew where the east side line of the St. Louis Lode mining claim was prior to the time that he staked his Nine Hour claim, and that the westerly line of the Nine Hour claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line; that after his discovery the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour claim, which point is correctly shown on defendant's map (Exhibit "E"); that when the St. Louis was surveyed for patent such survey was started from its northeast corner stake and ran in the di-

rection of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up where no stake or monuments had ever stood before, from which point the said side line had an angle to its corner No. 3; that the extension of said east side line of said St. Louis claim over witness' Nine Hour claim was wrongful and resulted in securing as a part of said St. Louis mining claim all of the area of said Nine Hour claim embraced within said line save and except the 30-foot strip.

XI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the defendant (plaintiff in error here) to call Warren De Camp and to establish by him that he was a co-owner in the Nine Hour claim at the time that the Adverse Claim suit was pending; that he knew the settlement that was made, and that he would not have consented thereto but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents, regardless of where the apex of the lode in which such mineral so found might be; that he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim; that he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness stand and in refusing to permit the said defendant (plaintiff in error here) to prove by said Sterling that at the time De-

fendant's Exhibit "A," attached to defendant's answer herein, was drawn he was a lawyer; was interested in said Nine Hour claim as a co-owner; that he understood the law of apex rights; that it was distinctly understood and agreed between the owners of the Nine Hour and of the owners of the St. Louis at the time said bond was made that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or compromise ground, and that the owner or owners of the St. Louis should not have the right to follow into such ground any lead, lode, ledge, or vein having its apex within the surface boundaries of the St. Louis claim; that the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the compromise ground from the apex rights of the St. Louis claim adjoining it, and that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy that he was a co-owner in the Nine Hour claim at the time of the settlement of the adverse suit; that it was the distinct understanding between all of the parties to that settlement that the compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour discovery shaft; that no settlement or agreement would have been entered into by the obligees named in the said bond but for the fact that the said obligees were to have all of the mineral contained in said ground, without regard to where the apex of the vein might be in which such minerals were found.

XIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objections made by the plaintiff to the calling of John Langan, then in court, to the witness stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines; that he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing, upon objection of plaintiff, to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer was in his handwriting; that the words "together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time said bond was drawn.

XVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit defendant to read in evidence the original complaint and the replication in case No. 2798, old series, of the records of the District Court of the Third Judicial District of the Territory of Montana within and for the County of Lewis and Clark, wherein William Robinson *et al.* were plaintiffs and Charles F. Mayger was defendant, being the Adverse Claim suit referred to in the record in the Specific Performance case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E."

XVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in overruling and denying defendant's motion to direct a verdict in its favor.

XVIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in telling them, in the preliminary portion thereof, that "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge in giving to the jury its instruction numbered 5, which said instruction is as follows, to wit:

> "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133 foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XX.

The Court of Appeals erred in holding that the said Circuit Court did not err in charging the jury as in its instruction No. 8, which said instruction is as follows, to wit:

"If you find that the course of strike of the discovery vein in the St. Louis mining claim, as disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location; and I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between said planes generally lengthwise of the claim."

XXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No. 17, which is as follows, to wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of the said trespass, cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in its instruction No. 18, which said instruction is as follows, to wit:

> "The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except to those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No 19, which is as follows, to wit:

> "When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries.
>
> "And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass

and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom."

XXIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving to the said jury its 20th instruction, which is as follows, to wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrong-doer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to wit:

"As to the evidence disclosed by the books of the defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from

other parts of defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in giving to the jury its 23d instruction, which is as follows, to wit:

"The law is well settled that if one wilfully places the property of another in a situation where it cannot be recovered, or its true amount of value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated."

XXVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to wit:

"In considering any ore extracted from block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXVIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. 1:

> "The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said compromise ground; and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said compromise ground, or to any part or portion thereof or to the possession thereof, or of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all mineral contained in said compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis claim or otherwise, and as for all alleged trespasses in said compromise ground, you will not take the same into your consideration or return any verdict therefor.
>
> "The court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon lode within its surface

boundaries. The court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and 133-foot planes."

XXIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title or interest in and to the compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then

pending in the District Court of the First Judicial District of the State of Montana within and for the County of Lewis and Clark, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff, by its replication filed in this action, that such judgment was rendered, but it is alleged that it was confined to such mineral and such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of the said compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the compromise ground was distinctly in issue in that case, as appeared by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover for any and all ores which you may find that the defendant has mined within the surface boundaries of the compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extra-lateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which ex-

tends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

XXXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to wit:

"As I have already explained to you, plaintiff's extralateral right on the Drumlummon vein, where

the same is found within surface boundaries of its St. Louis claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that vein in its course, downward on its dip extend to and under the surface boundaries of the Nine Hour claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface.

"For illustration, suppose that the plaintiff in the case, had only one hundred feet of the apex of its St. Louis claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour claim, that on its dip downward and under the surface of that claim it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour claim.

"Applying these principles to the case at bar, the court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein.

"Then should you further find, from a preponderance of the testimony that plaintiff's discovery vein

on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis claim."

XXXIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to wit:

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence that such vein continues on its course through its St. Louis claim, and passes out of the south end line of this claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot drift is found, but that it only extends into the wall of the tunnel for a few feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of the plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXV.

The Court of Appeals erred in holding that said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI, which said instruction is as follows, to wit:

> "The court instructs you that your first duty is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of the plaintiff's St. Louis claim. In the first place you must ascertain which of the surface lines are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis claim was in what has been denominated the 65-foot shaft and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a south-westerly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside of the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis grounds to the easterly boundary thereof, then, in whatever direction it might dip, it

would not have extralateral rights within or under the Nine Hour claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all the Drumlummon lode found within the surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour claim, it is plaintiff's misfortune, and one which neither this court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it."

XXXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the compromise ground or the 30-foot strip as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode mining claim. The court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis claim was first located and first patented. Having been patented as a part of the St. Louis, the compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every part of the St. Louis claim."

XXXVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII, which said instruction is as follows, to wit:

> "Because the so-called compromise strip was patented as a part of the St. Louis Lode mining claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis Company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

XXXVIII.

The Court of Appeals erred in holding that the verdict in said case in the Circuit Court was not grossly excessive and apparently the result of passion or prejudice, and that the judgment rendered thereon and said verdict were not excessive and were supported by the evidence given in said

cause on the trial thereof, the said verdict and judgment being grossly excessive and unsupported by the testimony in said cause and contrary thereto.

XXXIX.

The Circuit Court of Appeals erred in holding that the defendant in error had a right under the terms of the deed from the defendant in error to the plaintiff in error of the compromise strip, and notwithstanding the grant therein contained, to the ores within said strip if and to the extent that the apex thereof was contained within that portion of the St. Louis claim retained by the defendant in error.

XL.

The Circuit Court of Appeals erred in holding that the surrounding circumstances alleged to exist, and by that court held to exist, and the nature of the property authorized a construction to be placed upon the deed of the 30-foot strip entitling the defendant in error to assert ownership in the ore within said conveyed premises by virtue of the existence of an apex of the lode in which it was contained within that portion of the ground patented as the St. Louis claim retained by the defendant in error.

XLI.

The Circuit Court of Appeals erred in holding that the portion of the St. Louis claim retained by the defendant in error was senior in location to the 30-foot strip conveyed by the defendant in error to the plaintiff in error and which was patented as a part of the St. Louis claim.

XLII.

The Circuit Court of Appeals erred in holding that, notwithstanding the issuance of the patent for the entire St.

Louis claim, including the 30-foot strip as a part of the St. Louis claim, and the conveyance thereof under said patent by the defendant in error to the plaintiff in error, the portion conveyed to the defendant in error could and should be treated as a part of the Nine Hour claim and later in location than the portion retained by the defendant in error, which was treated as a part of the St. Louis claim, and therefore as older in location than the 30-foot strip.

XLIII.

The Circuit Court of Appeals erred in refusing to hold that the federal statutes authorizing the patenting of lode mining claims, and under which the patent for the St. Louis Lode mining claim was issued, concluded the question of the date of location of all the territory embraced within the patent for said claim, and in refusing to hold that the court and jury and the defendant in error were precluded from asserting or so construing the said federal statutes, being Revised Statutes, sections 2325 and 2326, as to permit the investigation of the relative ages of different portions of the patented territory and to preclude the treatment of the different portions of the claim thus patented as parts of different locations and of different ages.

XLIV.

The Circuit Court of Appeals erred in refusing to hold that an investigation of the relative ages of the Nine Hour claim and the St. Louis claim was material, in view of the terms and provisions of the deed for the 30-foot strip.

XLV.

The Circuit Court of Appeals erred in not holding that all portions of the territory patented as the St. Louis claim were of the same age, and that the portion conveyed by the defendant in error to the plaintiff in error as the 30-foot strip

was of equal priority and had all the rights which it would have had as a part of the St. Louis Lode mining claim.

XLVI.

The Circuit Court of Appeals erred in holding, and in basing its decision upon the holding, that the 30-foot strip conveyed by the defendant in error to the plaintiff in error constituted the entire conflict between the Nine Hour and St. Louis claims, and that unless the defendant in error was permitted to assert apex rights to ore contained in the 30-foot strip by virtue of an apex within the portion of the St. Louis claim retained by it, the deed for this strip would convey more to the plaintiff in error than the plaintiff in error would have received had it patented, as a portion of the Nine Hour claim, the conflict between that claim and the St. Louis claim.

XLVII.

The Circuit Court of Appeals erred in holding that the territory in which the apex upon which the defendant in error relied in asserting title to the ores contained within the 30-foot strip was senior in location to the 30-foot strip.

XLVIII.

The Circuit Court of Appeals erred in holding that the defendant in error had or could assert extralateral rights by virtue of having a portion in width of the Drumlummon apex between the 108 and 133-foot planes.

POINTS AND AUTHORITIES ON ARGUMENT.

I.

JURISDICTION OF THE SUPREME COURT.

We contend that we are here on writ of error as of right. Section 6 of the act establishing circuit courts of appeal makes the decisions of those courts final "in all cases in which the jurisdiction is dependent *entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States." It further provides that "in all cases not hereinbefore in this section made final, there shall be OF RIGHT an appeal, or writ of error, or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed $1,000, besides costs."

The case at bar was commenced in the Circuit Court of the United States for the Ninth Circuit, District of Montana, on or about the 20th day of September, 1893, and the jurisdiction of the court was invoked by reason of the federal questions stated in the complaint. This is shown by the fact that Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Hawkins were made parties to the suit. Each of said personal defendants was at the date of the commencement of the action and the service upon him of the summons herein a resident of the town of Marysville, in the State of Montana, and a citizen of that State. (See return of marshal, Record, p. 7; testimony of Alex. Burrell, Record, p. 84.)

The original complaint (Supplemental Record) contains no allegation of diverse citizenship, nor any allegations as to the citizenship of the seven individual defendants, and from this it is plain that the defendant in error was not seeking to

invoke federal jurisdiction on account of diverse citizenship. There is an allegation that plaintiff is a corporation organized and existing under the laws of the State of Montana, and that the defendant in error is likewise a corporation organized under the laws of the Kingdom of Great Britain. This allegation was plainly made, we submit, not for the purpose of invoking jurisdiction, but of alleging the corporate existence and capacity of the plaintiff and defendant, and specifically does so. Strength is added to this conclusion by the fact that in the amended complaint thereafter filed, as well as in the second amended and supplemental complaint, upon which the case was twice tried, there is the same allegation of corporate existence and capacity, but no formal allegation of diverse citizenship. The defendant in error, from the commencement of this action up to the time it got into this court, relied for jurisdiction upon the fact that it was raising federal questions, and did not rely upon diverse citizenship.

The federal questions it was attempting to plead are clearly outlined in the original complaint, but are not so distinctly averred as they are in the amended and the second amended and supplemental complaints. There is no dispute, or doubt, or controversy over the proposition that the cause of action pleaded in the original complaint is identical with that set out in the second amended and supplemental complaint which appears in the record here. When an amended complaint has been made and sets forth the same cause of action as that set up in the original complaint, it is regarded as a continuation of the original pleading and takes effect as of the date when such original complaint was filed. In other words, it relates back to and supersedes the original complaint.

Heath vs. Whidden, 29 Me., 108.
Brockway vs. Thomas, 32 Ark., 311.
Schuyler Nat'l Bank vs. Bollong, 28 Neb., 684.
Clark vs. Delaware, etc., Canal Co., 11 R. I., 36.
Chattanooga, etc., R. Co. vs. Whiteside, 89 Ga., 190.

Where a judgment was reversed on appeal and a proper amendment filed after the case was remanded to the trial court, it was held to relate back to the commencement of the action.

Fleenor vs. Taggart, 116 Ind., 189.

Where, in an amended declaration, the citizenship of the parties is stated in the present tense, without stating such citizenship existed at the time of the commencement of the suit, it is sufficient, because the amended pleading will be held to relate back to that date.

Birdsall vs. Perigo, 5 Blatchf. (U. S.), 251.

In *Bowden et al. vs. Burnham et al.,* 59 Fed., 752, 754, it was said:

> "The objection to the jurisdiction of the court is grounded on the fact that the original petition did not disclose that the assignors of the claims which the plaintiff sued on as assignee were citizens of States other than Kansas, and the further fact that, rejecting those claims, the amount claimed by the plaintiffs was less than $2,000. But the court very properly granted the plaintiffs leave to amend their complaint (section 954, Rev. St. U. S.) and it was amended. Nevertheless, the plaintiff in error asserts that as the compaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is everyday practice to allow amendments of the character of those made in this case, and when they are made they have relation to the date of the filing of the complaint or the issuing of the writ or process amended. When a complaint is amended, it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite aver-

ments to show it. In other words, the amendment did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit."

See also *Carnegie-Phipps & Co. vs. Hurlbut*, 70 Fed., 203-218.

The first federal question which we say is clearly defined in the second amended and supplemental complaint may be stated thus: When a vein enters and departs through the same boundary line of a mining claim, is such vein entitled to extralateral rights?

In this complaint the pleader describes a point where the vein enters the St. Louis claim, at which point he draws down an imaginary line parallel with what are claimed to be the end lines of the claim and which he denominates his 520-foot plane. The point where the said vein is alleged to enter is between corners Nos. 1 and 2 of the St. Louis Quartz Lode mining claim and 520 feet distant from corner No. 1. From this point the course of the vein and its departure is described as follows:

"Along the east side line of the said claim between corners Nos. 1 and 2, S. 21 deg. 15 min. west 512.7 feet to a point, being the intersection of the said east line of the said St. Louis Quartz Lode mining claim between corners Nos. 1 and 2 with the west line of the said 30-foot strip hereinbefore described; thence S. 59 deg. 50 min. west 108 feet and along the west line of the said 30-foot strip to a projected parallel end line of said St. Louis Quartz Lode mining claim extending vertically downward, which passes through the hanging wall of the said vein at the surface and at the crossing of the said hanging wall with the west line of the said 30-foot strip."

The second federal question distinctly defined in said second amended and supplemental complaint is couched in the following language:

> "That it is also the owner of, in possession, and entitled to the possession, of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim."

The first federal question arising upon this allegation may be concisely stated as follows: Where the apex of a wide vein crosses the boundary line of the claim at an acute angle, can the miner within whose surface boundaries the apex is found follow it extralaterally beyond the point where he has the whole of the apex within his surface boundaries?

Clearly stated in this last allegation are two other federal questions, as follows:

May a miner follow a vein departing through a boundary line of his claim at an acute angle on the strike as well as the dip of such vein? and

May a miner, under the provisions of the Mineral Lands Act, and because an apex of a claim departs across a boundary line of his claim at an acute angle, invade and take possession of a portion of an adjoining claim, in order to enable him to follow extralaterally a lead of which he has only a portion of the apex?

What is such federal question sufficient to confer jurisdiction upon this court is clearly defined in *Starin vs. New York*, 115 U. S., 257, as follows:

> "The character of a case is determined by the questions involved (*Osborn v. Bank of the United States*, 9 Wheat., 737, 824). If from the question it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a LAW of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this

subject (*Cohens v. Virginia*, 6 Wheat., 264, 379; *Osborn v. Bank of United States*, 9 Wheat., 737, 824; *The Mayor v. Cooper*, 6 Wall., 247, 252; *Gold Washing & Water Co. v. Keyes*, 96 U. S., 199, 201; *Tennessee v. Davis*, 100 U. S., 257, 264; *Railroad Co. v. Mississippi*, 102 U. S., 135, 140; *Ames v. Kansas*, 111, U. S., 449, 462; *Kansas Pacific v. Atchison R. Co.*, 112 U. S., 414, 416; *Provident Sav. Co. v. Ford*, 114 U. S., 635, 641; *Pacific Railroad Removal cases*, 115 U. S., 1, 11)."

This definition of a federal question is logical and concise and has been adopted and reaffirmed in—

Gibbs vs. Crandall, 122 U. S., 106.

Shreveport vs. Cole, 129 U. S., 41.
Richards vs. Rock Rapids, 31 Fed., 506.
Robinson vs. Anderson, 121 U. S., 524.

Upon the authority of this case it has been held that federal questions were involved in the following cases, namely, *Southern Pac. R. Co. vs. California*, 118 U. S., 112, the question being whether the State may tax a franchise of a corporation incorporated under an act of Congress; *Cook vs. Avery*, 147 U. S., 385, where the plaintiff's title rested upon the validity of a lien claimed under a federal judgment; *In re Lennon*, 166 U. S., 544, which was a bill to enforce compliance with the Interstate Commerce Act; and in *Cheesman vs. Shreve*, 37 Fed. Rep., 37, involving the right to enter beneath the surface of a mining claim, where depending upon the construction of a federal mining law. This definition has likewise been approved in the following cases:

Germania Ins. Co. vs. Wisconsin, 119 U. S., 476.
New Orleans vs. Benjamin, 153 U. S., 424.
Pratt vs. Paris Gas Co., 168 U. S., 259.
McKane vs. Des Moines, 174 U. S., 177.
Northern Pac. R. Co. vs. Soderburg, 188 U. S., 526.

In support of its contention that in this case jurisdiction depends upon the diverse citizenship of the parties, and that hence the decision of the Court of Appeals was final, the defendant in error, as respondent in No. 13, Original, cites three decisions rendered by this court, the first of which is *Amer. Sug. Ref. Co. vs. City of New Orleans*, 181 U. S., 277.

This was a petition to this court for writ of certiorari requiring the United States Court of Appeals for the Fifth Circuit to certify to this court, for its review and determination, this case, or, in the alternative, it prayed for writ of mandamus to command the judges of said court of appeals to hear, try, and adjudge said cause. The City of New Orleans had brought suit in the Civil District Court for the Parish of Orleans against the petitioner for the purpose of collecting a city license tax for the year 1899, alleged to be due under the laws of the State of Louisiana and an ordinance of the city of New Orleans, as an occupation tax for carrying on the business of refining sugar in that city. This cause was removed to the Circuit Court of the United States, the petition being based solely upon the ground that the defendant, the petitioner, was a corporation organized under the laws of New Jersey, and the plaintiff in the case below a municipal corporation organized under the laws of Louisiana.

It was not pretended that any federal question arose, either on the face of the complaint or elsewhere upon the record. A bare statement of this case shows that it is not in point here, because this action was commenced, not upon the ground of diverse citizenship, but because of a right of property asserted under the federal law and appearing upon the complaint. There was no allegation whatever, as already shown, of diverse citizenship.

It will be observed that the third syllabi seems to warrant the contention of the counsel on the other side. But, turning to the last paragraph of Mr. Chief Justice Fuller's opinion in the case, upon which this syllabi is based, it will be

seen at a glance that it is not warranted by that paragraph. That paragraph states the law beyond question, and nowhere in it is it intimated that when the determination of the question in dispute turns upon a law of the United States, the decision of the Court of Appeals is final.

The court first cites *Carter vs. Roberts*, 176 U. S., 496, which relates to the cases mentioned in section 5 of the Evarts act, by the terms of which a direct appeal lies to this court in six specified cases; and then it proceeds to qualify the observations contained therein by saying that where the jurisdiction of the circuit court depends on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States, or the constitutionality of a law of the United States, or the construction of a treaty, or where the constitution or a law of a State is claimed to be in contravention of the Constitution of the United States, the court of appeals may certify the question to this court or it may decide the whole case. In short, there is nothing in this part of the opinion, nor elsewhere in the case, that supports respondent's contention.

The next case so cited by counsel is that of—

Ayres vs. Polsdorfer, 187 U. S., 585.

This case, like that of *Amer. Sug. Ref. Co. vs. New Orleans, supra*, was a case of diverse citizenship, without any suggestion of any other ground of jurisdiction, either disclosed by the complaint or the record. It was a case of ejectment and trespass, brought originally in the Circuit Court of the United States for the Western District of Tennessee, for the recovery of lands and damages, the sole ground of jurisdiction being the diversity of citizenship of the parties. The plaintiffs were citizens of Indiana and the defendants were citizens of Tennessee.

The opinion contains a very full and accurate discussion of the right to a writ of error or appeal in cases of this character, but there is nothing in it applicable to the case at

bar; it does not even remotely support the contention of the respondent.

The last case cited by the counsel on the other side in the brief which they have filed in No. 13, Original, is that of *Empire State Idaho M. & D. Co. vs. Hanley*, 198 U. S., 292. Here, again, the federal jurisdiction depended solely and entirely upon diverse citizenship, and the pretense that there was any other ground of jurisdiction was found to be wholly without support. Hanley brought suit in the United States circuit court, claiming a third interest in the Skookum mining claim, under proceedings in the probate court, and an eighth interest in the same claim, which had come to him by mesne conveyance from the original owners. The circuit court, upon the trial of the case, held against him as to both of these interests. Hanley sued out a writ of error to the court of appeals, which held that he was not entitled to relief as to the third interest, but that he was as to the eighth interest. The decree was therefore reversed and the cause remanded for further proceedings (109 Fed. Rep., 712). The case then went back and was referred to a master for an accounting as to the eighth interest, who reported a considerable sum due Hanley. The circuit court upon the filing of the report reduced the amount found by the master by deducting therefrom the cost of working the property while Hanley was excluded from the mine, and entered a decree quieting Hanley's title to the eighth interest and giving him judgment for the reduced amount. Both parties appealed from so much of the judgment as was against them. Hanley's appeal was sustained (126 Fed. Rep., 97) and the case was remanded with direction to correct the decree in accordance with the opinion of the appellate court.

An appeal was sued out to this court, the appellants undertaking to bring themselves within the principle announced in *Spreckles Sugar Refining Co. vs. McLane*, 192 U. S., 397; *Nor. Pac. Ry. Co. vs. Soderberg*, 188 U. S., 526, and other

cases of that character, and for this purpose they contended that Hanley's original complaint, claiming a one-third interest, amounted to an assertion that he had been deprived of that interest by the probate court without due process of law, and therefore presented a federal question. The court, by Mr. Chief Justice Fuller, found against this contention, as follows (page 297):

> "What Hanley asserted was that his title to the one-third interest was good because he had purchased it from the administrator, under the decree of the probate court, and that the subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence."

We need not stop to point out that each and every of these questions, as stated by Mr. Chief Justice Fuller from the record, were questions arising under the laws of the State of Idaho. For, as the opinion concisely states (page 298), "The decisions of the courts below did not turn on any federal question."

Under the clear and unambiguous language of sections 5 and 6 of the Evarts act, it would be a surprise to find any decision of this court, or of any court of appeals, which would sustain counsel's contention in this matter, and we feel more than warranted in saying that no such decision exists.

It is customary in pleading in actions to which corporations are parties, and is necessary as a matter of good pleading in many code States, that the corporate existence and the corporate capacity of these corporations shall be specifically alleged. The usual form of allegation is that the respective corporations are organized and exist under the laws of the jurisdiction in which they are created, and that they have capacity to do the things which it is indicated in the complaint or answer they claim the right to do or have done.

These allegations are contained in pleadings in the State courts where no question of federal jurisdiction arises.

California Steam Nav. Co. vs. Wright, 6 Cal., 258.

Esters Pleading, 4th ed., vol. 1, secs. 369, 370, 372, 373.

Bliss on Code Pleading, 2d ed., secs. 246, 249.

When, therefore, as in this case, the original complaint alleged the corporate existence and capacity of the plaintiff in error and defendant in error in the form and with the phraseology customary where a question of jurisdiction of the federal court did not exist, and such as is usual in cases in State courts, it would seem clear that it cannot be assumed or taken as intended by the pleader to rest the jurisdiction of the federal court upon diversity of citizenship; and when to this there is added the fact that there were seven individual defendants about whose citizenship no allegation whatever is made, it would seem to be conclusively established that no attempt was made to rest the jurisdiction of the court to any extent or at all upon diversity of citizenship. Certain it is that allegations of the character contained in the original complaint do not state diversity of citizenship or facts which would confer jurisdiction upon the Circuit Court on that ground.

Florida Central, etc., Railroad vs. Bell, 176 U. S., 321:

In this case this court held that an allegation in the complaint that three of the plaintiffs were citizens of Texas, without any allegation as to the citizenship of the five other plaintiffs, and with an allegation of the citizenship of the defendant, did not disclose an intention to rest the jurisdiction of the federal court upon diversity of citizenship. It further appeared in the complaint in that case, as in the original and the amended complaints in this case, that a claim was made by the plaintiff of a right which rested upon the grant of a

federal statute, and its existence was dependent upon a construction of such statute contended for by the plaintiff. Under these circumstances, at page 325, the court said of the complaint:

> "Does it disclose that the plaintiffs invoked the jurisdiction of that court *because* the parties were citizens of different States or because the case was alleged to be one arising under the Constitution, laws or treaties of the United States?"

And at page 326 it is further said:

> "Accordingly, it appears that the *theory* of the plaintiffs in bringing their suit in the Circuit Court of the United States was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an act of Congress, and was therefore a case arising under the laws of the United States."

Again, the court says:

> "As then, the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on the construction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final, because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different States."

Therefore, in determining whether jurisdiction depended entirely upon diversity of citizenship, this court held that the theory of the complainant, as evidenced by the failure to plead the citizenship of all the parties to the complaint, was controlling. Applying this principle to the original complaint, it will be at once seen that it was not the theory of

the complainant that jurisdiction existed because of diversity of citizenship.

It further appears in the case at bar by the complaint, as it did in the complaint in that case, that it was the definite purpose of the complainant to base the jurisdiction of the Circuit Court solely upon the existence of federal questions which are stated in the complaint, when its allegations are considered in connection with the plat attached to the complaint and made a part of it. The statute under consideration contemplated and provided that the basis of jurisdiction of the Circuit Court might be a federal question, or diversity of citizenship, or both federal question and diversity of citizenshop; so that three possible cases were covered by the provisions of the statute. There might be a case in which diversity of citizenship alone was alleged as the ground of jurisdiction, in which case jurisdiction depended "entirely" upon diversity of citizenship, and the decision of the Circuit Court of Appeals was made final. That is not this case. Again, federal questions might be presented by the complaint and these alone made the ground of federal jurisdiction. That was clearly the case upon the original complaint in the action at bar. Again, the complaint might allege diversity of citizenship and a federal question or questions as grounds of jurisdiction of the Circuit Court, in which case the fact that diversity of citizenship was alleged and was alleged as a ground of jurisdiction would not make the decision final, for jurisdiction would not depend entirely upon the diversity of citizenship. In short, the statute permitted and provided for a case in which the plaintiff might elect to base jurisdiction solely upon a diversity of citizenship or might instead base jurisdiction upon diversity of citizenship and federal questions or only upon federal questions. Only in one of these three classes of cases is the decision final. Neither by the terms of the original complaint nor by the terms of the first and second amended complaints was the jurisdiction made or attempted to be made to depend "entirely" upon

diversity of citizenship. In each of the three complaints federal questions were presented as grounds of jurisdiction, and in the first complaint this was the only ground presented. At the oral argument in "Original, No. 13," at this term, counsel for defendant in error admitted—indeed, expressly affirmed—that it was the purpose or intention and belief of counsel preparing the original complaint that it should and did state as the grounds of federal jurisdiction the existence of federal questions.

In *Northern Pacific Railroad Co. vs. Sodeburg*, 188 U. S., 526, the complaint disclosed that there was a diversity of citizenship between the plaintiff and defendant upon which federal jurisdiction could be based; but it also appeared from the complaint that the plaintiff claimed a right to the land in dispute, containing granite, upon the contention that land containing granite was not excepted from the grant to the plaintiff upon the theory that it was mineral land. This presented a federal question, and, clearly, but not more clearly than did the original complaint herein, disclosed that it was the theory and purpose of the complaint to present this federal question as a basis of federal jurisdiction. While in that complaint the contention or interpretation of the statute by the defendant was set up, this could not and did not confer jurisdiction, for that depended upon the allegations of the complaint and not upon a statement of the defense or contentions of the defendant.

In the case last cited, a motion was made to dismiss the appeal in this court upon the ground that the decision of the Circuit Court of Appeals was final, since the jurisdiction of the Circuit Court had been based upon diverse citizenship. This court said:

> "But to impress the attribute of finality upon a judgment of the Circuit Court of Appeals it must appear that the original jurisdiction of the Circuit Court was dependent 'entirely' upon the diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one

> ground of jurisdiction, *but as it appears that its title rests upon a proper interpretation* of the land grant act of 1864 as to the exception of non-mineral land, *there is another ground,* wholly independent of citizenship, under that clause of section 1 of the act of 1888 (25 Stats., 433) clothing the Circuit Court with jurisdiction of all civil suits involving over two thousand dollars 'and arising under the Constitution or laws of the United States.' "

This decision expressly recognizes that there may be two grounds of jurisdiction—one diversity of citizenship and the other a federal question—and that in such case there is a right to a writ of error from the Circuit Court of Appeals to this court. The case is in important aspects parallel to the one under consideration. It appears from the complaint in the case now here that the title of the defendant in error rests upon a proper interpretation of the Mineral Lands Act of May 10, 1872, as to the exception of ore contained in a vein apexing outside of the portion of the claim conveyed and crossing twice the same side line, and in addition thereto upon a right to follow a vein upon its dip when but a portion of the width of its apex is within the territory of the plaintiff; which grounds of jurisdiction are wholly independent of citizenship and depend upon whether the construction which this asserted right puts upon the federal mining statutes may be enforced.

These questions were not merely put forward for the purpose of simulating grounds for jurisdiction, but they were in fact *bona fide*, vital, and controlling questions in the case as to the rights of defendant in error. As the second amended and supplemental complaint stood, the defendant in error undertook to assert apex rights against its own conveyance, against territory patented under the same grant of the Government as that in which the apex upon which it relied was contained, against its own grant, and also undertook to assert apex rights by virtue of having a portion of the width of the apex within its claim. These contentions

made it necessary to pass upon and construe the meaning of the federal statute, as we elsewhere more particularly point out, and upon the interpretation of the statute depended the existence of the right of the complainants. These questions were passed upon by the Circuit Court at the first trial, with the result that Judge Knowles sustained the contention of the defendant in error upon the one claim and held against it upon the other; while the Circuit Court of Appeals held for the defendant in error upon both contentions, and in so doing discussed and construed the federal statutes and made a decision upon subjects and questions which had never been determined by this court and which have not yet been so determined.

Judge Morrow (104 Fed., 664, 667) says in this case:

> "When a secondary or accidental vein crosses a common side line between two mining locations at an angle and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts."

And again, on the same page, it is said:

> "The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides: 'the locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended down vertically.' The plaintiff in error maintains that the words 'top or apex' cannot be construed to mean 'top or apex or any part thereof,' and that under the strict construction necessary extralateral rights would not follow when the whole of the apex was not within the surface lines."

The dissenting opinion of Judge Ross (104 Fed., 669) emphasizes the importance and existence of one of these important federal questions, to wit, the right to follow upon its dip a vein when the apex enters and departs from a side line only of a mining claim. The complaint disclosed the existence of these two important federal questions, which had never been determined by this court and have not now been determined, and upon which the complainant rested the jurisdiction of the Circuit Court.

To repeat, those questions were: (1) Whether extralateral rights were possessed by virtue of the ownership of the apex of a vein which entered and passed out of the same side line of the mining claim, and when that side line was a broken line and the apex entered through one portion thereof and passed out through the other; (2) Whether extralateral rights existed by virtue of the ownership of a portion of the width of an apex.

These federal questions are in the original complaint, in the first amended complaint, and in the second amended and supplemental complaint; so that, at all times from the institution of the action down to the last step taken in the trial thereof, the jurisdiction of the Circuit Court was rested, intentionally and solely, upon federal questions.

We here present only the evidences of the existence of these questions, of their having been at all times the grounds for federal jurisdiction. Later in this brief, and under the proper headings, we present the authorities and the arguments upon which we contend that the construction of the federal statute claimed and relied upon by the defendant in error was erroneous; that the opposite thereof, contended for and relied upon by the plaintiff in error, was correct, and that the Circuit Court of Appeals erred in affirming the adoption by the Circuit Court in the one instance of the erroneous contention of the defendant in error and in reversing the action of the Circuit Court in the first trial in adopting the correct construction of the plaintiff in error.

We respectfully submit that we are in this court as of right, and that the questions to be adjudicated in this case are all strictly within the definition of a federal question as given by Chief Justice Waite in *Starin vs. N. Y., supra.*

II.

THE LAW OF THE CASE.

Assignment of Error No. I.

Our first assignment of error is addressed to what we believe was error in the Circuit Court for the District of Montana and in the Circuit Court of Appeals in holding that they were bound by the opinions rendered in this case in 102 Fed., 130, and 104 Fed., 664.

While it is true that the Circuit Court did not base its rulings upon the proposition that these opinions were expressly "the law of the case" (Record, p. 23; side p. 46), yet it followed them faithfully and explicitly throughout the trial on all questions of law and of fact referred to therein. Indeed, it followed the doctrine more conclusively than it would have been justified in doing even if these opinions were clearly and undeniably "the law of the case," in that it refused to admit competent testimony for the establishment of new facts material to the issues, which was offered by the defendant and rejected by the court because such testimony had not been offered on the former trial and therefore did not appear in the opinions referred to.

In the Court of Appeals, its refusal to consider the questions which were raised in the record and argued was based broadly upon the proposition that the two former decisions were "the law of the case." After reciting the history of the case on the two former writs of error to that court and the decisions of this honorable court and the judgment rendered in the court below October 8, 1902, the court says:

> "There is certainly nothing in this judgment to indicate a purpose on the part of the court to set aside its decisions rendered in the case. On the contrary, the fact that these decisions were not withdrawn or recalled and the case set at large indicates that the court has no intention of doing so. The decisions were allowed to stand as the opinions of this court upon the issues presented by the writs of error, and hence, became the law of the case. The fact that the mandate does not contain a reference to these opinions does not determine that they are without authority" (Record, pp. 154, 155).

It is to be remembered in this connection that after the case, on two writs of error, was returned to the Court of Appeals by this court, the case came on to be heard before the Circuit Court of Appeals on the transcript and on the petition of The Montana Mining Company, Limited, for the issuance of a single mandate in the cause, and the court, after reciting the entry of the judgment reported in 102 Federal, and the judgment reported in 104 Federal, and the receipt of mandates from this court, rendered another judgment, as follows, to wit:

> "It is now ordered and adjudged that the judgment so heretofore made and entered herein BE VACATED AND SET ASIDE, and that in lieu thereof it is ordered and adjudged that the judgment of said Circuit Court in this cause be and the same is hereby reversed, with costs, and the cause is remanded to said Circuit Court for a new trial."

Accordingly the said cause, on or about the 31st day of October, 1902, was remanded to the Circuit Court for a new trial, as "according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding."

Our contention is that this action of the Court of Appeals

relieved the cause of the doctrine of "the law of the case" and set it at large. While this question is not a very important one in this court, so far as this case is concerned, it is an important one in practice. The rule that an adjudication by an appellate tribunal becomes the law of the particular case on all subsequent trials is a wholesome one and one which should be enforced; yet we think it should be confined to cases which fall exactly within the conditions where it has been hitherto enforced.

A very able and exhaustive discussion of the growth and application of this doctrine is found in the *City of Hastings vs. Foxworthy*, 45 Neb., 67.

Our contention, distinctly stated, is that when the Court of Appeals set aside the two judgments and remanded the case for a new trial, without instruction, to the trial court, it thereby set the case at large, and neither the Circuit Court nor the Circuit Court of Appeals was bound by the opinions.

2 *Black on Judgments*, sec. 511.

1 *Wharton on Ev.*, sec. 781.

French vs. Edwards, 4 Savg., 125.

> "On the reversal of a judgment at law, therefore, the theory of the law is that the parties are in *statu quo*, and are to be considered as if the judgment had never been rendered."
>
> *Tarleton vs. Goldthwaite's Heirs*, 58 Am. Dec., 296, 298.
>
> *MacJilton vs. Love*, 54 Am. Dec., 449.
>
> *Stearns vs. Aguirra*, 7 Cal., 443.
>
> *Phelan vs. San Francisco*, 9 Cal., 15.
>
> *Argenti vs. San Francisco*, 30 Cal., 463.
>
> *Heidt vs. Miner*, 113 Cal., 385.

> "When the decree was reversed and the case remanded generally without any specific directions to the lower court, that court was not required to proceed according to the opinion of the appellate court,

but it had authority to permit a change in the pleadings and to hear the cause *de novo.*"

Lang vs. Metzger, 69 N. E., 493, 497; citing—
Chickering vs. Failes, 29 Ill., 294.
Parker vs. Shannon, 121 Ill., 452.
Perry vs. Burton, 18 N. E., 653.
Cable vs. Ellis, 11 N. E., 188.
West vs. Douglas, 34 N. E., 141.
Russell vs. Rush, 48 N. E., 990.

"On a former trial of this case on appeal, reported in 5 Col., 341, the opinion reversing the case holds the law different from what we have laid down, and we cannot and will not assent to the view therein expressed. The doctrine of a former adjudication can have no application to this case, as it was a simple reversal of the judgment of the court below for reasons therein stated; but no judgment was given for one party or the other, except that of reversal, and what the law fixed as a consequence, the costs of court. The judgment of reversal is conclusive that the case was reversed, but of nothing more."

Bynum vs. Apperson, 9 Heisk. (Tenn.), 623-644.

We respectfully submit that this case falls exactly within the rule laid down in the case just cited. The judgment of the Court of Appeals of October 8, 1902, was simply a judgment of reversal and the case remanded for a new trial. Nothing was definitely settled by this judgment between the parties.

In speaking of the character of an opinion which will give rise to the doctrine of "the law of the case," the Supreme Court of Maryland says:

"But to give the binding decision these conclusive qualities, it ought to be explicitly declared and perfectly understood, and, to become 'the law of the case,' it ought definitely to settle the rights of the litigant parties."

Hammond's Lessee vs. Inloes, 4 Md., 138, 167.

"But if this is the same case as that formerly before the court, it is a misnomer to call the opinion and a simple judgment of remand for a new trial *res adjudicata*. The opinion delivered may properly control the lower court, and ordinarily should do so, and would undoubtedly, on the same facts, be entitled to great weight on a second appeal to this court. But the opinion or reasoning for the judgment is no part of it, and the judgment itself is not final between the parties, and therefore is not conclusive."

White vs. Downs, 40 Tex., 227.

"Where the Court of Appeals reverses a decree and remands the cause without directions, such order is not *res adjudicata* on retrial of the same cause in the county court."

Friedman vs. Lesher, 64 N. E., 736; citing—
Linington vs. Strong, 11 Ill., 152.
Henning vs. Aldridge, 156 Ill., 305; 33 N. E., 754.
Board vs. Nelson, 44 N. E., 743.

We have examined many authorities which discuss the question of "the law of the case," and have not been able to find a single case where that doctrine has been held applicable after the judgment which gave it force and validity had been set aside, either by the court which originally rendered the judgment or by an appellate court to which the case was carried. We do not think that the Court of Appeals has been more successful in this respect than we have been.

In *Browder vs. McArthur*, 7 Wheat., 58, there had been a decree which was remitted to the court below to be carried into effect according to its mandate. A subsequent appeal was taken from the Circuit Court for supposed error in carrying into effect the mandate, and it was held that this appeal did not authorize an inquiry into the merits of the original decree. The decree stood there unrevoked, in full force and effect, and definitively settled the rights of the parties. In other words, it became and was "the law of the case" in the fullest sense of that term. And in each case cited by the

court in support of its application of this doctrine to the case at bar it will be found that the opinion which was thus enforced rested upon a valid subsisting judgment, which had not been revoked, reversed, modified, or set aside in the court in which it was rendered or by any appellate tribunal.

We submit that the case at bar ought not to be an exception to this unbroken line of authorities.

This case discloses that the Circuit Court of Appeals dealt with and this court is called upon to determine a number of important questions relating to the meaning, force, and application of the Mineral Lands Act of May 10, 1872. The Circuit Court of Appeals, in the two decisions made by it in 102 Fed., 430, and 104 Fed., 664, passed upon these questions, and yet its decisions and determinations thereon were not and could not be a final adjudication and determination of the law upon that subject. The Circuit Court of Appeals, whatever may have been the ground upon which the Circuit Court obtained jurisdiction of the case, is, as to these questions, an intermediate appellate court. Ultimately these matters, in their very nature, must come to this court, through some channel, for final determination. Whether the existence of a portion in width of an apex within a claim gives to or confers upon the owner of that claim extralateral rights, as is contended in this case and so decided by the Circuit Court of Appeals, cannot be put at rest by the adjudications of circuit courts or circuit courts of appeal, and must come to this court for adjudication in order that the last word may be said upon that subject and an interpretation put upon the statute covering this question which is not open to further debate or litigation. Until that determination is made, we may have, and in fact do have, upon this question warring and conflicting decisions by courts of coördinate jurisdiction.

It appears from decisions which have been called to the court's attention in this brief that in the eighth circuit, especially in Colorado, it has uniformly been held by the fed-

eral court that, in order that extralateral rights may be asserted, the apex—all the apex—must be within the claim making that assertion. It is now adjudicated by the Circuit Court of Appeals of the Ninth Circuit that this is not the law, in the opinion of that court. In a case in the Circuit Court of Appeals for the Eighth Circuit, where no controversy or debate between the litigants in that case upon this subject was presented, this was assumed to be the law; but up to the present time that question has not been argued in this court, and has not been considered or determined by this court. Its importance cannot be exaggerated. The necessity for its determination in this and similar cases is manifest.

The same statements may be accurately made with reference to the case of a vein passing in and out of a claim through the same side line, especially where that side line is a broken line, and whether the vein thus passing through the same side line be the discovery or what is called a collateral vein, for the existence of extralateral rights under these conditions has not yet been affirmed or denied by a decision of this court.

The question was fairly presented, discussed, and necessarily determined in this litigation.

The Circuit Court of Appeals further held that when mining territory had been patented under and as a part of a given lode location, notwithstanding the conclusive character of patent proceedings and of the issuance of patent as to the title of the claim, the fact that there had been a conflict between two locations as to which owned the territory in dispute would enable a court to so construe the federal mining statutes as to permit the court to disregard the fact that all this territory was patented as one location, and in an apex controversy treat a part of it as of one date of location and another part as of another date of location. This is an important question, one apt to arise at any time where there have been compromises and settlements of the character existing in this litigation. It was an important question before

the Circuit Court and the Circuit Court of Appeals. It was contrary to the contentions and made most significant and controlling in arriving at the result reached by the Circuit Court of Appeals. That question has never been determined by this court, and must, before it is finally settled, be so determined.

There are other questions to which, for the purposes of this argument, it is needless to refer, federal in their character, important in their nature, undetermined as yet finally by the decisions of this court.

Under these circumstances, to treat as finally determined and put beyond further investigation or review by this court these questions is to disregard the plainly manifest and logical condition prevailing, which renders all decisions of the appellate courts upon such questions tentative in their nature and requiring for their conclusive settlement a decision of this court.

It has been held upon sound reasoning and salutary principles that the decisions of an intermediate appellate court are not *res adjudicata* in the case itself, nor the law of the case, when further action is taken therein. In *Calhoun Gold Mining Company vs. Ajax Gold Mining Company*, 27 Colo., 9, it was said:

> "It is contended by counsel for appellee that the ruling in Branagan *v.* Dulaney, and cases following it, is wrong, and that this question should now be considered. In opposition to a reconsideration of the rights of cross-lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and even if wrong should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this State. We are aware of the gravity of reversing a long established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this Commonwealth have a right to presume that when a question has been once settled by this court, that its

> decision is correct and that all may rely upon it. We understand generally that when a decision has established a settled rule of property upon which rights are predicated (and especially those relating to real estate) the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous (Black on Interpretation of Laws, sec. 152), but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. Black on Interpretation of Laws, *supra;* Sutherland's Stat. Constr., sec. 316; Boon *v.* Bowers, 30 Miss., 246."

And that court therefore, and because the decisions relied upon were based upon interpretations of Federal statutes and the final determination thereof must be made by the Supreme Court of the United States, reversed the former decision of the Supreme Court of Colorado, and was, in the results which it reached, affirmed by this court.

Calhoun Co. vs. Ajax Co., 182 U. S., 499.

In *Brown vs. Tourtelotte,* 24 Colo., 244, the Supreme Court of Colorado held, as correctly stated in the syllabus to that case, that—

> "1. LAW OF THE CASE.—A decision by the Court of Appeals in a case the final decision of which may ultimately rest with the Supreme Court, does not constitute the law of the case, although it may not have been reviewable in the first instance upon appeal or writ of error.
>
> "2. SAME.—The doctrine that the law of the case as announced by an appellate court is conclusive in subsequent proceedings, does not apply to the decisions of intermediate courts, but only to appellate tribunals which are also courts of the last resort."

The Court of Appeals of Colorado is an intermediate appellate court as to some matters and a court of final jurisdiction as to others.

In *Davidson vs. La Plata County,* 26 Colo., 552, the Supreme Court of Colorado said:

> "The decision of the Court of Appeals is not *res adjudicata.* It has been held by this court, in the case of Brown *v.* Tourtelotte, 24 Colo., 204, that the doctrine of the law of the case does not apply to decisions of the Court of Appeals in cases where their final determination may ultimately rest with the Supreme Court."

The logic of these decisions, we submit, is impregnable. Upon what ground may it be claimed that the decision of an intermediate appellate court, which does not make the law upon that subject, does not ascertain or authoritatively and conclusively settle it, shall be taken as the law of the case when that particular question may reach and must finally be determined by another appellate court?

III.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AND STATES FACTS SHOWING THAT THE PLAINTIFF HAS NO CAUSE OF ACTION.

Assignment of Error No. II.

In our statement of the case we have called attention to the fact that the amended and supplemental complaint, after setting forth the boundaries of the St. Louis claim in accordance with the calls of its patent, and after claiming ownership of "all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said *fractional* portion of

said St. Louis Lode mining claim," makes the following exception:

> "Save and except that portion thereof known as the 30-foot strip, or compromise ground, which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis mining claim is described as follows, to wit:"

Here follows a description of the compromise ground by metes and bounds, as the same is described in the bond for a deed (Defendant's Exhibit A, attached to its answer); then closes as follows:

> "Including an area of about 12,844.50 square feet, TOGETHER WITH ALL MINERAL CONTAINED THEREIN."

The next paragraph of this complaint alleges:

> "That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated the Nine Hour Quartz Lode mining claim, situated and being east of the said St. Louis Lode mining claim, and including the 30-foot strip, or compromise ground aforesaid."

Can the English language express anything more clearly and plainly than this? Here is an allegation that the defendant in error is the owner of the St. Louis Lode mining claim, with all the veins, leads, lodes, and ledges having their tops or apexes within the surface boundaries of the claim, save and except the compromise ground, together with all the mineral therein contained; and, not to leave the ownership of this piece of ground in doubt, it avers that the plaintiff in error here is the owner of it. It seems incomprehensible to us that there should be standing on the records of the Circuit Court of the Ninth Circuit for the District of Montana a judgment against us in the sum of $195,000, in favor of the defendant in error, recovered upon a complaint

in which it is distinctly alleged that the compromise ground is our ground, together with all of the mineral therein contained. True, this admission is followed by the allegation of paragraph 4, which is as follows, to wit:

> "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis mining claim, is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said 30-foot strip, or compromise ground, which is a part and portion of the Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit:"
>
> Record, p. 4.

Then follows a description by courses and distances of the strike of the vein through the St. Louis surface boundaries and the point where it departs therefrom.

Next follows this allegation:

> "That it is also the owner of, in possession, and entitled to the possession of an additional portion of the said apex of said claim lying to the southern point hereinbefore mentioned, a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis mining claim."

Reference is then made to a map attached to the complaint, and paragraph 5 follows. We quote:

> "That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the 30th day of June, 1893, knowingly, wrongfully and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz rock and ore therefrom, and removing the same and converting it to its own use and

> benefit, and they are now still removing and converting the same, which said quartz rock and ore is of the value of $200,000; on account thereof this plaintiff has been damaged in said sum.
>
> Record, pp. 4, 5.

Then follows the supplemental part, wherein it was originally alleged that the damage up to the 26th day of June, 1899, was $50,000, and which was amended on the trial so as to change the $50,000 to $400,000.

We have thus carefully set out these portions of this pleading for the purpose of calling the court's especial attention to the fact that at the close of paragraph 2 of the complaint and at the beginning of paragraph 3 there is, first, an express disclaimer of ownership of the compromise ground or of any of its mineral contents, and, second, an averment that plaintiff in error is the owner of that strip of ground. Now, we say that neither in paragraph 4 nor paragraph 5, nor anywhere else in the complaint, is there any allegation conflicting with this admission of ownership of this ground and its mineral contents in the plaintiff in error.

Let us still more distinctly state this. This complaint alleges that the plaintiff in error is the owner of the compromise ground and the mineral therein contained, and there is nowhere within the four corners of the complaint any claim on the part of the defendant in error that it owns or has any interest whatever in the compromise ground or in any of the mineral therein. Therefore we say that it does not state facts sufficient to show a cause of action on behalf of the plaintiff therein and does show that it has no cause of action. Will this court, or ought any court, go beyond the pleading and say that a plantiff has a cause of action, notwithstanding the fact that he has not set it up or claimed it in his complaint? So far as stating a cause of action in the plaintiff is concerned, this complaint is of no more value than so much blank paper.

Let us look at a few of the fundamental rules governing the construction of pleadings.

> "Every part of a pleading must be adopted in construing it."
> 4 *Encyc. Pl. & Pr.*, p. 746.

> "In interpreting the language of a pleading, the words must be construed according to their popular sense; they must receive their ordinary and usual signification when taken in every relation to the subject-matter with which they are used."
> *Ibid.*, 748.

> "In the construction of a pleading nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case will warrant."
> *Ibid.*, 746.

Cogswell vs. Bull, 39 Calif., 320, 325, was an action against a board of directors of a corporation to compel the performance of a corporate duty, and no demand had been made upon the board to bring the action. The reason given in the complaint for the omission to make a proper demand was "that the board of directors who now manage and control the affairs of said corporation is *nearly*, if not entirely, composed of the same men who composed the board of directors of said corporation during the time hereinbefore mentioned." The court said:

> "This is bad pleading and lacks the precision which is requisite in an allegation of fact."

In *Smith vs. Buttner*, 90 Cal., 95, a house had been raised six or seven feet in height, and the wife of the plaintiff had been injured by a fall in attempting to get out of the house. The complaint did not allege that the fall and injury were in anywise due to the negligence of the

defendant. In other words, the negligence was well pleaded, but that it was the cause of the injury was not pleaded. The court held that the complaint did not show facts sufficient to constitute a cause of action.

In *Hoag vs. Warden*, 37 Cal., 522, the complaint alleged the collection of money by a sheriff and his failure to return the execution, but it did not allege that he had failed to pay the money over to the plaintiff. The court said:

> "We cannot assume that it has not been paid without any averment on the point."

In *Chamberlain vs. Blair*, 58 Ill., 385, it is said:

> "The court cannot incorporate any material into the plea which the pleader has omitted by accident or design."

In *Griswold vs. Mather*, 5 Conn., 438, the court says:

> "It is a universal principle of pleading applicable to all courts, because founded on a reason which applies equally everywhere, that no fact can be assumed in favor of the party pleading, except it be directly averred, or arise by necessary inference."

See also

Lemon vs. Stevenson, 36 Ill., 51.
Stone vs. Young, 4 Kan., 11.
Coolbaugh vs. Roemer, 30 Minn., 424.
Cook vs. Putnam County, 70 Mo., 668.
Bartlett vs. Prescott, 41 N. H., 493.
Tooker vs. Amoux, 70 N. Y., 397.

Material facts must be alleged by direct averment and not by inference.

Stringer vs. Davis, 30 Cal., 318.
Moore vs. Besse, ibid., 570.
Bush vs. Cetta, 52 Ark., 378.

A pleading which affirms and also denies an essential fact shows no cause of action or defense.

Dickinson vs. Maguire, 9 Cal., 46.

The Court of Appeals meets our contention by saying of the complaint:

> "It contains the allegation, however, that the defendant in error is the owner of and in the possession of the St. Louis Quartz Lode mining claim, and all of the quartz rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apices of which lie within the surface lines of the said fractional portion of the St. Louis Lode mining claim. It describes the mining claim by metes and bounds, and shows that it is about 1500 feet in length by nearly 600 feet in width."
>
> 102 Fed., 130.

This language, so far as quoted above, is found in paragraph 2 of the complaint, and the whole of that paragraph must be taken into account when trying to settle what is therein pleaded. Fairly construed, it is that the plaintiff is the owner of the St. Louis lode and of the quartz rock and ore therein contained, SAVE AND EXCEPT. As to so much as is excepted therein it is not the owner; and it proceeds in the following paragraph, No. 3, to tell who is the owner. Is it possible to construct an issue upon this allegation? We have admitted it in our answer. There is nothing in it for us to deny, or that we care to deny, and least of all would we want to deny what is therein so clearly and plainly alleged—that we are the owners of the compromise ground and of all of the mineral therein contained. An issue is created by the allegation of a matter on one side and its denial by the other side. Here, so far as this controversy is concerned, there is and could be no issue. Here there is no assertion in the complaint of ownership of a single ounce of mineral

contained in the compromise ground. The opinion from which we have just quoted (102 Fed., 130) continues:

> "The description closes with these words: 'Said lodes numbered 54 and 55A extending 1,500 feet in length along said St. Louis vein or lode.' It alleges that the strip of land beneath the surface of which the ores in controversy were mined, lies east of the side line of the claim; it alleges that the dip of one of the veins having a portion of its apex inside of the surface of the St. Louis claim is to the east, and dips under and beneath the 30-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim, the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits."

What is there in this language that asserts ownership of the ores in the compromise ground? Suppose the vein does enter under the compromise ground, is that an allegation that the plaintiff owns the mineral therein, contrary to its express allegations in paragraphs 2 and 3 of its complaint that the defendant owns the ground and all the mineral therein contained? We say no such inference can be drawn; and if it could, it would destroy the pleading. In construing a pleading, it must not be so construed as to make one part repugnant to the other. It is well established that where there is a repugnancy so gross as to destroy the meaning of the pleading, it is fatal.

Springfield Second Nat. Bank vs. Hart, 8 Ind. App., 20.

Wright vs. Card, 16 R. I., 719.

It cannot possibly be true that the plaintiff owns either the compromise ground or any of the mineral therein contained if the defendant owns them. A pleading which

affirms and also denies an essential fact shows no cause of action or defense.

Dickinson vs. Maguire, 9 Cal., 46.

We feel that we should apologize to this court for presenting at such length and with so many citations of authority a principle so fundamental in its character and so absolutely obvious upon the face of this pleading. But we beg the court to remember that this lawsuit has been long drawn out, and that thus far we have not been able to make obvious to the lower courts what seems so clear to us. We leave it, with one other suggestion. The Court of Appeals, contrary to all authorities, we think, infers a claim of ownership from the allegation at the beginning of the fourth paragraph of the complaint, which reads as follows:

> "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis mining claim, is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said 30-foot strip or compromise ground, which is a part and portion of the said Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit:"

Then follows a description by courses and distances of the strike of the vein through the St. Louis claim, by reference to which and to the diagram attached to the complaint, a copy of which is found opposite page 5 of the record, it will be seen that the Drum Lummon vein traverses the St. Louis claim for a distance of 512.7 feet before it reaches a point opposite the north end of the compromise ground.

In the absence of any allegation to the contrary, why should not this claim, if there is any claim of ownership, be held applicable only to this portion of the apex which does not lie opposite the compromise ground, and why should

it not be held that the trespass alleged in the fifth paragraph of the complaint, in the absence of any allegation that it took place elsewhere, be construed as having taken place in this ground and not in the compromise ground. To infer, for it is a matter of pure inference, and not alleged, that the trespass or any part of it took place in the compromise ground, or that there is in this allegation a claim of ownership, is to make this complaint repugnant to itself, and, as we have already seen, it is the duty of the court to so construe it that each clause shall be consistent with every other clause.

The Court of Appeals, in disposing of our objection to the deficiency of this complaint, says that no motion or demurrer was filed to the complaint. In Montana, and perhaps in some other jurisdictions, it is not considered good practice to demur to a complaint on the ground of the want of a cause of action, unless it would be impossible for the plaintiff to set up a cause of action; nor is any such demurrer or motion necessary, under the practice of that State, to preserve the objection.

> "SEC. 685. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action."
>
> Code Civ. Pro. of Montana.

If we had never raised this objection and if we raised it *ore tenus* in this court for the first time, it would be just as efficient as if we had raised it a dozen times by demurrer.

A VEIN THAT ENTERS AND DEPARTS THROUGH THE SAME LINE OF A MINING CLAIM CANNOT HAVE EXTRALATERAL RIGHTS.

Another reason why this complaint does not state facts sufficient to constitute a cause of action is that it is claiming extralateral rights for a vein which enters and departs through the same line of its claim.

In the complaint there is not a word said which indicates, or from which a just inference may arise, that there is any other vein within the surface boundaries of the St. Louis claim except the Drumlummon vein, the point of entry and departure of which is so clearly averred in paragraph 4 of the complaint. In passing upon this question it is to be remembered that it was raised at the beginning of the trial, before there had been a solitary word of testimony showing that there was any other vein. The Circuit Court had then to deal with a mining claim which, so far as the allegations of the complaint showed, had but a single vein in it (Record, p. 4), and that entered and departed through the same boundary line. There was nothing alleged by which the court could determine whether that line was a side line or an end line. Parallelism of the end lines is essential to the existence of extralateral rights.

Iron Silver M. Co. vs. Elgin M. Co., 118 U. S., 196.

It has long since become settled law that what are the end lines of a claim is to be determined, not by what the locator has designated as such, but by the strike or course of the lode through a claim; that is, an end line of a claim which is or would be crossed by the lode on its strike through the claim.

Flagstaff Mining Co. vs. Tarbet, 98 U. S., 463.
Iron S. M. Co. vs. Elgin M. Co., 118 U. S., 196.
Argentine M. Co. vs. Terrible M. Co., 122 U. S., 478.
King vs. Amy, etc., M. Co., 152 U. S., 222.
Del Monte vs. Last Chance M. Co., 171 U. S., 57.
Walrath vs. Champion M. Co., ibid., 293, 307.
New Dunderberg M. Co. vs. Old, 79 Fed., 598, 606.
Tyler vs. Sweeney, 79 Fed., 280.

The principle for which we contend is very clearly stated by a judge who has had a very wide experience in the determination of questions arising under the Mineral Lands Act, as follows:

> "The defendant's contention seems to be that because they claim they have subsequently discovered the apex of a lode running northerly and southerly, at the easterly line of their surface location, they have a right to follow the lode on its dip underneath the Cosmopolitan claim, without regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location and find out what the defendant Foote located; because, if he located on a lode that he thought had a northerly and southerly course, and made his location accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his right by the facts as they are shown to exist, instead of what he thought existed at the time the location was made."
>
> *Cosmopolitan Mining Co. vs. Foote*, 101 Fed Rep., 518, 521.

In the Cosmopolitan case the court found from the testimony that the discovered lode ran more nearly in an east and west direction through this claim than it did in a north and south direction, and for this reason refused to give the defendant extralateral rights under the Cosmopolitan surface.

It is no unusual thing, owing to the scoring away of the mountain sides by the action of the elements, to find the tops or apexes of veins entering and continuing for a greater or less distance inside the surface boundaries of another claim, as in this case, and therefore the question is one of im-

portance to mining men and those interested in the business The only decided case touching the question is that of—

Catron vs. Old, 23 Colo., 433; 48 Pac., 687.

It holds that a single line of a mining claim cannot be held to be parallel with itself, and therefore, under conditions similar to those presented in this case, it was held that the extralateral right to such a vein is cut off at the point where it would encounter the side line of the claim extended downward vertically.

If it should be urged that the doctrine of *Catron vs. Old, supra,* is applicable only to discovery veins, it may be responded that nothing in the principle announced in that case so limits, expressly or by proper inference or doctrine.

As stated in *Catron vs. Old* and by the Circuit Court of Appeals in this case, 104 Fed., 667, the question has not yet been determined.

This question, even upon the assumption that it was confined to a collateral vein, has not been determined or decided, unless decided by *Catron vs. Old,* in any case other than the one at bar. It is a question apt to occur in almost any location, and is therefore one for determination by this court. May a collateral vein have apex rights when its position is such that if it were the discovery vein it could not have or assert them? When it is recalled that extralateral rights are in contravention of the common law, are not to be extended by construction, are not favored by the courts, as is set forth in *Del Monte vs. Last Chance Mining Co.,* 171 U. S., 84, it would seem to follow that restrictions which would preclude the locator of a claim having these rights upon a vein which he had discovered and made the basis of his title and location would preclude his asserting them as to a chance vein which happened to be within his territory and occupied the same relations with reference to the boundaries of his claim. The Circuit Court of Appeals assumes that the Drumlummon vein was an incidental or collateral vein, and that the St.

Louis location or discovery vein extended through the claim substantially parallel with its side lines and crossing both end lines. This cannot be taken to be the case, and the court should have considered the law applicable to the contention presented by the plaintiff in error as to the facts with reference to these veins and alleged veins and their positions. The plaintiff in error did not recognize that there was a discovery vein or that the discovery vein of the St. Louis claim passed through the staked end lines of that claim, but by its evidence proved that the so-called discovery vein which existed in the discovery shaft of the St. Louis location ran crosswise of that location, so as to make the so-called staked side lines end lines of the claim, in which event, whatever should be the character of the Drumlummon vein, whether it was the vein in which ore was found and upon which the location of the St. Louis claim necessarily rested or it was but an incidental vein, apex rights would be denied because the St. Louis vein so ran crosswise of the staked course of that claim. Apex rights could not be asserted, because, in the first instance, if the Drumlummon is the discovery vein, the doctrine and logic of *Catron vs. Old* is applicable and conclusive, and if the St. Louis location is based upon the discovery of another vein, having the course contended for by the plaintiff in error, then the end lines thus established may not be passed through by a vein upon its dip, as would be done if the defendant in error should be permitted to follow upon its dip the Drumlummon vein into the territory of the plaintiff in error. That the position of the so-called discovery vein, being the vein disclosed in the discovery shaft of that claim, had the direction stated above is testified to by a number of witnesses on behalf of the plaintiff in error, as is shown by the Record, pages 70, 71, 77–78, and as is pointed out in the discussion under division IV of this brief. With this evidence in the case and with the plaintiff in error making the contentions to which we refer, the Circuit Court could not rightfully assume, nor might the

Circuit Court of Appeals, that the Drumlummon vein was not the discovery vein upon which the location of the St. Louis claim de[illegible]nded, nor that the course of the so-called discovery vein, [illegible]aimed to have been disclosed in the dis-discovery shaft [illegible]f the St. Louis claim, did not have the course and direction outlined by the witnesses for the plaintiff in error. Therefore the instruction should have been one in which the law was given upon these various contentions, to be applied to the facts as they should be found by the jury under proper instructions. If this had been done, or should now be done, then it would be necessary to investigate and pass upon the asserted extralateral rights upon the several contentions of the respective parties.

NOT ONLY WAS NO CAUSE OF ACTION STATED IN THE COMPLAINT BUT IN ALL THE PLEADINGS NO CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF WAS STATED.

Not only did the complaint fail to state facts sufficient to constitute a cause of action, but on the whole pleadings there never was a cause of action stated. When in the replication the plaintiff admitted the execution of the bond and the deed and the adjudication in the Specific Performance case, it admitted itself out of court. The plaintiff by pleading cannot limit the force and effect of its agreement to convey and of the judgment or decree entered thereon, as it attempts to do in the replication, as follows:

> "That the said 30-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode mining claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as attached and incident to the said 30-foot strip or compromise ground, and that the minerals therein contained were intended to

comprise, and did comprise only such minerals as were contained in veins, lodes or ledges having their tops or apexes inside of the said 30-foot strip."

Record, pp. 13, 14.

The courts below, we have no doubt, have been largely misled by these allegations, but beyond any question the parties are bound absolutely by what is contained in these instruments, and they cannot give them a construction, by pleading or otherwise, contrary to their express terms. These allegations are surplusage, purely and simply; they might have been striken out on motion, but were not, and no proof was offered on the part of the defendant in error, on either of the trials of this case, in support of them. As shown by the offered and rejected proof in this record, if any such proof had been admissible, it would have been exactly the other way.

IV.

NO PROOF WAS ADMISSIBLE IN THIS CASE OF MATERIAL FACTS NOT PLEADED.

Assignment of Error No. III.

The rule that the *allegata et probata* must correspond is too well settled to require discussion or the citation of authorities, and we therefore call attention only to a few which are illustrative.

When the codes were new the late lamented Associate Justice Field, when Chief Justice of the State of California, quoting from certain popular rules promulgated by the Code Commission of the State of New York, laid down the inflexible rule on this subject as we understand it in the case of *Greene vs. Palmer,* 15 Cal., 411, 415, as follows:

"Second Rule.—Those facts, and those only, must be stated which constitute the cause of action, the defense, or the reply.

"Therefore, *first*, each party must allege every fact which he is required to prove, and *will be precluded from proving any fact not alleged.*"

See also

Boone vs. Childs, 10 Pet., 177, 209.
Garland vs. Davis, 4 How., 148.
McKinley vs. Irvine, 13 Ala., 696.

One of the most essential things which the defendant in error was called upon to prove was the strike and dip of its discovery vein.

"This proposition we affirm, with the addition that the end lines of the original (*i. e.*, discovery) vein shall be the end lines of all the veins found within the surface boundaries."

Walrath vs. Champion M. Co., 171 U. S., 293–308.

This decision is in harmony with all of the side-end-line decisions, and no other conclusion could be reached by any fair construction of the statute. And yet here is a complaint without an intimation in it, from start to finish, that there is any other lode inside of the surface boundaries of the St. Louis, save and except the Drumlummon lode, which enters through its east boundary line and departs through the same line at a point further south.

The defendant in error could not possibly try its case without proving the strike and dip of its discovery vein, and in both trials, without any issue being made by the pleadings, the defendant spent days in trying to prove the course and direction of its discovery vein, and we spent other days in proving that the discovery vein of the St. Louis, instead of running lengthwise of the claim, ran diagonally across it. And, what is more to the point, we did prove, beyond the peradventure of a doubt, that the discovery

vein of the St. Louis, if it continued in its own direction and did not die out before it reached it, would cross the east boundary line of that claim, and therefore that the defendant in error, instead of following a vein on its dip under a side line of its claim, was claiming the right of extra-lateral pursuit under an end line of the claim.

How stands the proof on this very important question? In the first place, it is an admitted fact that the vein at the bottom of the 65-foot shaft, as shown in the defendant in error's map, Exhibit No. 1, is the discovery vein of the St. Louis claim. As shown by the map itself, the vein, if continued in its own direction, would not pass out of the end line of the St. Louis claim; and the proof is that since that map was made, there has been 80 or 100 feet of development work done on the vein which is not shown on the map; that, following it on its strike from the bottom of the 65-foot shaft, this new work shows the vein turning to the right or southward.

Mr. William Mayger testifies (Record, p. 21), when speaking of the discovery vein:

> "It runs very nearly parallel with the side lines of the St. Louis as staked. We have traced the vein to within 95 feet of the end line at the south end, and to a distance of about 400 feet from the north end."

Mr. Mayger is here speaking of both veins, the Ivanhoe and the St. Louis discovery veins. Both of these veins fall into the Transcontinental fissure and are 90 feet apart. It is the contention of the defendant in error that these two veins were originally one vein, and that there was a throw, by some upheaval, of 90 feet. That was one of the main contentions in the trial of the case, our theory being that these were two small independent fissures, probably caused by the Transcontinental fissure in which the Transcontinental tunnel is run, as shown on the maps; that this,

being a great and persistent fissure, had caused these two smaller fissures, entirely independent of each other, and which had become to a slight degree mineralized afterwards, although the great Transcontinental fissure itself, for some unexplained reason, did not become mineralized at all. We showed incontestably that the throw of these two veins had been only about 15 feet instead of 90, and exactly in the opposite direction from that claimed by the defendant in error. The struggle in rebuttal of the defendant in error was to make the incontestable testimony of the rocks harmonize with its theory of the greater throw.

Now, going back a little, we have Mr. Mayger testifying that they have developed his vein, which means the discovery shaft of the St. Louis, to within 400 feet of the north end of the claim, and there is no doubt of the proposition that this is the discovery vein of the St. Louis. He has testified to it, and we have not attempted to gainsay him.

The only witness on the strike of the vein is Professor Walter Proctor Jenney. Speaking still of the two veins treated as one, Professor Jenney says (Record, pp. 30, 31):

> "I have examined the discovery vein of the St. Louis Lode mining claim. Its course is substantially northeast and southwest. I *believe* that the discovery vein extends the full length of the claim from end to end. (The Professor is as easily convinced of a fact in favor of the side of the case that he is representing as most experts.) Explorations underground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line."

Then follows testimony about certain unidentified croppings which he finds at various places.

What we call attention to especially is that these explorations underground show that the discovery vein of the St. Louis lies within 750 feet of the north end of the claim.

That would be true if the vein ran directly across the location and was found in the 65-foot shaft.

Here is an expert witness, competent to give courses and distances, but he is not interrogated with reference to them. On cross-examination we do interrogate him to some extent, but he is treating then of the vein as being composed of both the Ivanhoe and the St. Louis.

On the part of the plaintiff in error, Mr. Charles A. Molson, at pages 70-71 of Record, testified as follows:

> "To the eastward of the said drift (*i. e.* the Ivanhoe) there is a slate and granite contact. There is at that point a possible movement of 8 or 9 feet indicated, but there has been no throw of 90 feet. There is nothing on the surface to indicate such a throw. The last 84 or 85 feet of the level in the north drift shows a turn of 10 to 12 degrees northeast, and if the vein continued in the same direction it would cross the easterly side line of the St. Louis claim near the 520-foot plane."

This testimony relates to the discovery vein of the St. Louis, as admitted and claimed by the defendant in error.

On page 71 of the Record, Mr. Wilbur E. Sanders, another mining engineer, testifies as follows:

> "From the bottom of the 65-foot shaft, the course of the vein is north 73 deg. east, and if it continues in that direction it would cross south of the 520-foot plane as shown on the plaintiff's map."

Again, Mr. Richard M. Atwater, another mining engineer of large experience, after describing the work on the discovery vein, giving its development and the evidence found in the ground that there was no throw of 90 feet, and that the Ivanhoe and the St. Louis discovery were separate veins, says with reference to the latter (Record, p. 79):

> "If extended in its own direction the discovery vein would cross the easterly boundary line of the St.

Louis claim between corners numbers 1 and 2 at a point approximately 590 feet south of corner No. 1. I think the discovery vein is a very weak and irregular vein. I think the fissure is very likely caused by the Transcontinental fissure itself, and therefore it would only be a crack."

These witnesses are testifying to physical facts found in the ground. If they were wrong about the course of the level on the discovery vein, from the bottom of the 65-foot shaft easterly, it was only a question of applying instruments to show that fact incontestably. And yet when we go to the rebuttal (Record, pp. 84–85) there is not a single word of testimony to contradict the statement of these witnesses, and it is apparent that there simply couldn't be. The fact was, as shown by the development of their discovery vein, that if the little crack in the earth's surface which served them for a discovery vein extended in its own direction, it would without doubt cross the east boundary line of its claim.

We therefore respectfully submit that this proof shows the easterly boundary line of the St. Louis, under the decisions of this court and of every other court in the mining States and Territories, to be an end line and not a side line of the St. Louis location. It has never yet been held, and never can be held, under the Mineral Lands Act that a miner may follow a vein on its dip beyond the end line of his claim. Of course, the testimony actually given upon the question of the strike and dip of the original discovery vein is not all embraced in our assignment No. III, nor a tenth part of it.

On page 25 of the Record the court will find a stipulation made by counsel in open court that the objection there made was to cover all testimony offered by the plaintiff with reference to this important matter. We say, unless the rule of law is different from that stated by Mr. Justice Field in *Greene vs. Palmer, supra,* and the other decisions

above cited, that this was, beyond the peradventure of a doubt, reversible error, and this court should reverse the judgment if there was no other error in the case.

V.

A VEIN ENTERING AND DEPARTING THROUGH THE SAME BOUNDARY LINE OF A CLAIM WHERE THERE IS NO OTHER VEIN WITHIN THE SURFACE BOUNDARIES OF SUCH MINING CLAIM CANNOT HAVE EXTRALATERAL RIGHTS, AND PARTICULARLY IS THIS TRUE WHERE THE VEIN SO CROSSED ON ITS ENTRY AND DEPARTURE IS AN END LINE.

ASSIGNMENTS OF ERROR NOS. IV, XXXIV.

If there is no other vein in the St. Louis claim than the Drumlummon vein, then the end lines of that claim are not and cannot be determined by any vein whatever, unless they are determined by the Drumlummon vein. This is but to state an apparent truism. If the Drumlummon vein is the only vein within the St. Louis claim, then it is either the discovery vein or there was no discovery vein. If it is to be taken as the discovery vein, then we have a case in which the discovery vein passes through two different portions of a broken line constituting a staked side line which are not and cannot be parallel, and which cannot, for the purpose of extralateral rights, be treated as end lines, and there are therefore no end lines, either staked or constructive, which define or permit the existence of extralateral rights, and at once the doctrine of *Catron vs. Old,* 23 Colo., 433, *supra,* becomes applicable to the discussion we have made under division III and renders further discussion here superfluous.

VI.

ESTOPPEL.

ASSIGNMENTS OF ERROR NOS. V, XXVIII, XXIX, XXX.

In our statement of facts at the beginning of this brief we have given quite fully the history of the bond for a deed (Defendant's Exhibit A, attached to its answer, Record, p. 9), the deed made to the plaintiff in error by the defendant in error for the compromise ground (Record, p. 11), and the Specific Performance case, the judgment-roll of which appears in the Record, pages 41 to 54, inclusive. By the reference to the bond for a deed, it will be seen that, as a part of the property to be conveyed, was all of the mineral contained in the compromise ground. There was neither qualification, exception, nor reservation; and, giving to this word ALL its usual signification, it must mean every part of the contents of that strip of ground in which mineral of any character was found. From our point of view, it might as well be claimed that the defendant in error was entitled, after having made this bond and deed, to have mined out any other rock or substance found in the compromise ground as the mineral-bearing quartz rock and ore found therein. If the parties at the time of the making of this bond had intended this language to embrace only such mineral as might be found in veins or lodes having the whole of their tops or apexes within the surface boundaries of the compromise ground, or to reserve the mineral found or that might thereafter be found in veins or lodes having their tops or apexes within the surface boundaries of the St. Louis claim, they should have, by fit and appropriate language, made this reservation.

The deed which the defendant in error subsequently executed, reluctantly, in compliance with this bond, made

the mineral contents of the compromise ground and all of it a part of the conveying or descriptive clause of the deed, and it further conveyed to the plaintiff in error all the dips, spurs, and angles, and also the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges, and franchises thereto appendant and appurtenant, and also all and every right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the said premises and every part and parcel thereof, with the appurtenances. This deed was a part of the judgment or decree in the Specific Performance case, and its form was passed upon and determined by the court in that case before the deed was executed.

In the judgment-roll of the Specific Performance case (Record, p. 52 *et seq.*) the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendant, and, as a conclusion of law, that the said defendants and each of them should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the said compromise ground or any part thereof, and from in any manner interfering with the possession or enjoyment thereof by the plaintiff; and in the decree, after providing that the deed which is directed to be made shall be in form like the one hereunto annexed, a copy of which appears in the Record in case No. 305, October term, 1899, it further provides:

> "That the said defendants, and all persons claiming under them or either of them, be forever barred from all interest or claim to the said premises or to any part or portion thereof, or to the possession of the same or any thereof."

We have pleaded these three several instruments in our answer as constituting an estoppel against the defendant in

error from claiming any portion of the minerals contained in the compromise ground. The courts below have refused to give these instruments any effect as an estoppel, or to regard them as settling any rights between the parties, save and except that the plaintiff in error was to have and receive from the defendant in error a deed for the surface of the compromise ground. We respectfully submit that in this there was reversible error. As already stated, this case was appealed to the Supreme Court of the State of Montana, and the judgment affirmed. Afterwards a writ of error was sued out to this court, and the judgment of the District Court again affirmed (171 U. S., 650). Under these circumstances it would seem as if we were justified in regarding the question of the rights of the parties hereto in the compromise ground to be definitely settled and set at rest.

On the trial of the Specific Performance case the defendant in error was represented by able counsel, and if the findings of fact and the decree of that court were not warranted in every respect by the testimony, that fact should have been pointed out and the judgment of the court corrected in that regard. It had the benefit of two appeals, and in neither of the appellate courts was any suggestion made that the judgment was too broad on the facts presented in its own record, and therefore we say that it must be true that the defendant in error was estopped from claiming any of the mineral contained in the compromise ground.

We have already pointed out in a previous portion of this brief that it did not make any legal claim to this mineral; that nowhere in its complaint is there a word or syllable that by any possible construction can be held to be an averment that it is the owner of an ounce of the ore contained in that ground and for which in this case it has recovered a judgment of $195,000 and claims to have established its title to an additional segment of the vein in which there is probably a value of as much more. We say that this is an unique case and one without parallel in

the records of this or any other court, so far as our reading extends. Nevertheless the courts below have held, as shown by their judgments, that the defendant in error not only claims in a legal manner the mineral contents of the compromise ground, so far as the same is contained in the Drum Lummon lode, or any part of it having its apex or any part of it within the surface boundaries of the St. Louis, and therefore it is we must discuss this case as if this claim were found in the complaint. Says the court of Appeals in its opinion (102 Fed., 130):

> "The use of the words 'together with all the minerals therein contained' is not sufficient. These words so inserted in the contract and the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles, and also the metals, ores, &c., therein.' "

The fact that the words "together with all the mineral therein contained" are a part of the conveying or descriptive clause of the deed signifies that the parties meant something by them. That they are not more significant than the other words quoted and said to be usually found in mining deeds is not conclusive. It is barely possible that if the authorities be closely examined it will be found that the words "dips, spurs, angles, metals, ores, etc.," themselves have some signification.

We may at the outset of this discussion admit that in our own opinion the words "together with all the mineral therein contained" do not particularly affect the efficiency of this deed as an instrument for conveying every right which the grantor had in the premises at the date of the conveyance, and that they were only put into the bond and into the deed to express the contract of the parties with clearness and precision, and to show that it was the intention of the parties to cut off and destroy all of the extralateral rights of the

grantor for the portion of the claim retained by it, in that portion conveyed.

Whatever may be the "inclusiveness" of these words, it seems to be very clear that when they were employed in the decree, even had they not been accompanied by a perpetual injunction precluding any claim of any kind on the part of the defendant in error within the bounded area of the compromise ground, they acquired a fixed, definite, and certain meaning, and without the injunction, but certainly with it, they operated to award the plaintiff in error every particle of mineral in the compromise ground. This conclusion is absolutely determined in the case of—

Bogart et al. vs. Amanda, etc., M. Co., 74 Pac., 822 (Colo.).

Reference to this case will show that it was an action upon a bond, not so favorable in its provisions as the bond in this case, given likewise to settle an adverse claim and followed by a Specific Performance case. It was held—in fact there was no dispute about the possession—that this language meant precisely what is claimed for the language in this decree. It will be noted in that case that, like in the case at bar, the decree included the mineral in the portion of the claim to be conveyed, and this upon appeal was affirmed, the court saying (p. 883):

> "That part of the agreement material here reads: 'The first parties agree within ten days after the issuance of the patent for the said Bogart lode, to convey to said second parties * * * the surface ground included within the conflict * * * saving, excluding and excepting from said deed so to be made the Bogart vein, lode, ledge or deposit wherever the same may be found to cross or pass through the conflicting surface.'
>
> * * * * * * * *
>
> "What was the intention of the parties at the time they made this agreement? If there is any am-

biguity in the language employed it must be resolved in favor of the grantee and against the grantors. The object of the court should be to place itself, as nearly as possible, in the position of the parties at the time, and from the terms of the contract and the surrounding circumstances arrive at their meaning. We do not think there is any difficulty in ascertaining this intention from the language of the written agreement. While there may be two distinct ownerships in mineral land—one of the surface or the soil, and the other of the minerals underneath—we are satisfied that by this agreement the applicant for the patent for the Bogart claim intended to convey to the owners of the conflicting location not merely the surface ground in conflict, as contradistinguished from the mineral beneath, but with this surface ground all underlying minerals except the Bogart vein. This is entirely clear from the excepting or reservation clause of the contract, whereby the owners of the Bogart reserved to themselves, and excepted from the grant, the Bogart vein. The agreement contemplated that the owners of the Bogart location might proceed without objection from the senior locators, to obtain a patent for the ground in conflict. When they got their patent they owned the entire estate, and by this agreement reserved to themselves, and excepted from the operation of the grant, only the Bogart vein. If it had been their intention to reserve all the mineral beneath the conflicting surface ground, they naturally would have made such provision in the excepting clause. Not having done so, but having excepted only the Bogart or cross-vein, it is plain that the intention of both parties was that the owners of the Amanda lode were to receive a conveyance of everything within the conflicting territory except the specific vein reserved."

THE BOND, THE JUDGMENT, AND THE DEED ARE ABSOLUTELY CONCLUSIVE OF THE RIGHTS OF THE PARTIES IN THE COMPROMISE GROUND.

We earnestly insist that the bond, the judgment, and the deed are absolutely conclusive of the rights of these parties in the present action, and there is no possible escape.

2 *Black on Judgments,* 503–505.

Since the decision of the celebrated case of the Duchess of Kingston the doctrine has been as stated and approved by the Supreme Court of the United States:

> "That the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court."
>
> *Cromwell vs. Sac. Co.,* 94 U. S., 351, 354.

In order to make the former judgment a bar it must be pleaded, not merely given in evidence.

Freeman on Judgments, 284, and cases cited.

The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation, and constitutes a bar to any new action or suit involving the same cause of action, either before the same or any other tribunal.

Casey vs. Pennsylvania Asphalt Pav. Co., 109 Fed., 744.

New Orleans vs. Citizens' Bank, 167 U. S., 371.

Ball vs. Trenholm, 45 Fed., 588.

Same case affirmed, 114 Fed., 189.

Ala.—*Tunkersey vs. Pettis,* 71 Ala., 189.
Ariz.—*Reilley vs. Perkins,* 56 Pac., 734.
Fla.—*Hoon vs. Felkel,* 7 Fla., 44.
Ill.—*Stickney vs. Gourley,* 132 Ill., 213.
Ky.—*Wallace vs. Mesher,* 4 Bibb., 508.
La.—*Heroman vs. La. Deaf, etc., Institute,* 34 La. Ann., 805.
Me.—*Walker vs. Chase,* 53 Me., 258.
Md.—*Walsh vs. Chesapeake, etc., Canal Co.,* 59 Md., 423.
Mass.—*Bigelow vs. Windsor,* 1 Gray, 209.
Foster vs. Basted, 100 Mass., 409.
Jamaica Bond, etc., vs. Chandler, 121 Mass., 3.
Mich.—*Sayers vs. Auditor,* 124 Mich., 259.
Minn.—*Wisconsin vs. Toorins,* 28 Minn., 175.
Miss.—*Aznew vs. McElroy,* 48 Am. Dec., 772.
Mo.—*McKinney vs. Davies,* 6 Mo., 501
Neb.—*Spear vs. Tiddbell,* 40 Neb., 107.
N. H.—*King vs. Chase,* 41 Am. Dec., 675.
Neb.—*Dillon vs. Chi., etc., R. Co.,* 58 Neb., 472.
N. Y.—*Reynolds vs. Gamer,* 66 Barb., 310.
N. C.—*Burnhild vs. Freeman,* 80 N. C., 212.
Penn.—*Marsh vs. Pier,* 26 Am. Dec., 131.
Cist vs. Ziegler, 16 Am. Dec., 577.
Bell vs. Allegheny Co., 63 Am. St. Rep., 795, and note.
S. C.—*Marigault vs. Holmes,* Bailey, 283.
Vt.—*Porter vs. Gile,* 47 Vt., 620.
Va.—*Howison vs. Weedan,* 77 Va., 704.
W. Va.—*Burner vs. Hoener,* 26 Am. St., 948.
Wis.—*Rosenow vs. Gardner,* 99 Wis., 358.

The Montana statute defines a judgment to be "the final determination of the rights of the parties in an action or proceeding."

Mont. C. C. P., sec. 1000.

"By such provision the state declares the legal effect and consequences of such a judgment; that it shall end the controversy as between the parties and end it forever."

State vs. Savage, 90 N. W., 898; 91 N. W., 557.

Where the facts averred and relied on are substantially the same the fact that a different form or measure of relief is asked in the subsequent action will not deprive parties of the protection of the prior findings and judgment in their favor.

Green vs. Rogers, 158 U. S., 478-502.
Nat'l F. & P. Works vs. Oconto C. W. S. Co., 113 Fed., 793-803.

Any right, fact, or matter in issue and directly adjudicated upon or necessarily involved in the determination of an action is absolutely *res adjudicata,* and cannot be relitigated between the parties or their privies, whether the claim or demand, purpose, or subject-matter of the two suits be the same or not.

Burk vs. Beverley, 1 How. (U. S.), 134.
New Orleans vs. Citizens' Bank, 167 U. S., 371-396.
Sou. Pac. R. Co. vs. U. S., 168 U. S., 1.
Mitchell vs. Chicago 1st Nat'l Bank, 180 U. S., 471.
Sou. Pac. R. Co. vs. U. S., 183 U. S., 519.
Landen vs. Merc. Bank, 186 U. S., 458.
Russell vs. Lamb, 49 Fed., 770.
Norton vs. House of Mercy, 101 Fed., 384.
Estill Co. vs. Embry, 112 Fed., 882.
Eastern Bldg. & Loan Ass'n vs. Welling, 116 Fed., 100.
Ætna Life Ins. Co. vs. Hamilton Co., 117 Fed., 82.
Cal.—*Green vs. Thornton,* 130 Cal., 482.
Conn.—*Betts vs. Starr,* 13 Am. Dec., 94, and note.
Mass.—*Baxter vs. New England Marine Co.,* 6 Mass. 277; 4 Am. Dec., 125.
Burke vs. Miller, 4 Gray, 114.
Chamberlin vs. Preble, 11 Allen, 370.
Burlen vs. Shannon, 90 Mass., 200; 96 Am. Dec., 733.
Stockwell vs. Silloway, 113 Mass., 384.
Sly vs. Hunt, 159 Mass., 151; 38 Am. St. Rep., 403.

The same doctrine has been held by the appellate courts in each of the following States, viz: Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, West Virginia, Wisconsin.

Commentors upon *res adjudicata* have said it

> "renders white that which is black, and straight that which is crooked, *facit ex curo rectum, ex albo nigrum,* no other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."
>
> *Jeter vs. Hewitt,* 22 How. (U. S.), 352, 364.

> "However numerous the questions involved in a suit, if they were tried and decided, the renewal of litigation for any of the same causes violates these cardinal principles of public policy, as much as if the suit presented but one single issue."
>
> *Whitehurst vs. Rogers,* 38 Md., 503.

> "The doctrine *judicium pro veritæ occipitur* is dictated by wisdom and sanctified by age, and is founded on the broad principle that it is to the interest of the public that there should be an end of litigation by the same parties and their privies, over a subject once fully and fairly adjudicated."
>
> *Martin vs. Evans,* 85 Md., 8; 60 Am. St. Rep., 292.

In *New Orleans vs. Citizens' Bank,* 167 U. S., 371, 398, the court quotes with approval the following:

> "No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies, whether the reasons upon which it was based were sound or not, and even if no reasons at all were given,

the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness.'

Cooley on Const. Lim., p. 47 *et seq.*, and authorities cited.

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

Bigelow on Estoppel, 3d ed., outline pp. lxi, 29, 57, 103.

"Better opinion is that the estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein."

Aurora vs. West, 7 Wall., 82, 103.

For law of proof of *res adjudicata* see monograph note to *Fahey vs. Esterley Machine Co.*, 44 Am. St. Rep., 562.

It is true that the judgment on which we so confidently rely is the judgment of a State court, but such judgments are distinctly within the purview of article I, section 4, of the Constitution of the United States and section 905, United States Revised Statutes, passed to carry the constitutional provision into effect. Judgments rendered in a State court are recognized as binding in the federal courts, and the same force and effect are given to them as they would have in the court wherein they were rendered.

In *Mills vs. Duryea*, 7 Cranch, 481, Mr. Justice Story declared:

"It remains only then to inquire in every case what is the effect of the judgment in the State where it is rendered."

Mr. Justice Miller, in *Green vs. Van Buskirk*, 5 Wall., 309, declares this to be the leading case on this subject, and certainly its doctrine has never been questioned.

McElmoyle vs. Cohen, 13 Pet., 326.
Christmas vs. Russell, 5 Wall., 302.
Green vs. Van Buskirk, ibid., 310.
Crapo vs. Kelley, 16 Wall., 637.
Hilton vs. Guyot, 151 U. S., 182.
Mutual Life Ins. Co. vs. Harris, 97 U. S., 336.
Dow vs. Johnson, 100 U. S., 186.
Dillingham vs. Hawk, 60 Fed., 498.
Thompson vs. Whitman, 18 Wall., 457.
Hampton vs. McConnell, 3 Wheat., 235.
D'Arcy vs. Ketchum, 11 How., 175.
R. R. Co. vs. Wiggin's Ferry Co., 119 U. S., 622.
Alkire Gro. Co. vs. Richesin, 91 Fed., 83 *et passim*.

From all this it will be understood that our contention, distinctly stated, is that what was the intention of the parties by the use of the words "together with all the mineral therein contained" was fought out as between these parties in the Specific Performance case; that every issue in that case was expressly found against the St. Louis Company, and that every matter therein adjudicated is absolutely and forever determined.

THE JUDGMENT IN THE SPECIFIC PERFORMANCE CASE, THOUGH RENDERED IN A STATE COURT, WAS BINDING IN THE FEDERAL COURTS.

It will readily be perceived, from the most casual reading of the record of this case, that the judgment in the Specific Performance case (Record, p. 53), so far from being given full faith and credit, was not given any credit whatever

beyond the fact that a conveyance was decreed for the compromise ground. (See opinion Circuit Court of Appeals, 102 Fed., 130.) No notice whatever was taken of the fact that this judgment was a bar against the defendant in error claiming any interest or right to the said premises or to any part thereof or to the possession of the same or any thereof, nor is it held in any way to prevent the recovery by the defendant in error of damages for ores mined out of the said compromise ground.

The Constitution of the United States, article I, section 4, provides that

> "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such records shall be proved and the effect thereof."

Section 905 of the Revised Statutes of the United States was passed to carry this constitutional provision into effect. In it we find this provision:

> "The said records and judicial proceedings so authenticated shall have such faith and credit given to them within every court of the United States as they have by law or usage in the courts of the State from which they are taken."

The judgment in the Specific Performance case, as we have already seen, expressly directs a conveyance of the compromise ground by metes and bounds, *together with all the mineral therein contained*, without any exception or reservation whatever, and expressly restrains and forever bars the plaintiff in the court below (the defendant in error here) from all interest or claim in or to the said premises or any part or portion thereof or to the possession of the same or any portion thereof.

Nothing can be clearer, it seems to us, than that, under

the provisions of the Constitution and the statute just quoted, judgments rendered in a State court are recognized as having the same binding force in the federal courts that they have in the courts wherein they were rendered.

Now, irrespective of what was the character of the property, what was the situation of the parties, what were the issues in the action, are we not narrowed down to the simple and single inquiry, What was the judgment of the State District Court? And when we reach this inquiry is there any possibility of being mistaken in the answer? Does it admit of any possible doubt or uncertainty? Is it not that this defendant in error should convey to us, by a good and sufficient deed of conveyance, the compromise ground, describing the same by metes and bounds, together with all the mineral therein contained? It is not all the mineral therein contained, save and except such as may be found in leads having their tops or apexes in whole or in part, within the surface boundaries of the St. Louis claim, as alleged in the replication herein. True, the Circuit Court and the Circuit Court of Appeals have read this into the judgment, but in doing so they have committed error. It is beyond the jurisdiction or power of the plaintiff by pleading, or of the Circuit Court and the Circuit Court of Appeals by construction, to add to or take away one jot or tittle from this judgment.

Counsel for the defendant in error are vehement in declaring that in construing this judgment and deed and the bond upon which both rested regard must be had for the *peculiar* property to which they relate. To this we again beg to suggest that the most important thing in a mining claim is the mineral therein contained. A strip of barren mountain-side 30 feet in width and 400 feet in length is of no value to anybody for any purpose without the minerals therein contained. In other words, in this they insist on sucking the orange, and ask us to content ourselves with the

rind. If the judgment was in any respect too broad, they ought to have asked the court below, or the appellate courts to which the case was carried, to modify it; and the fact that they did not do so is conclusive that no modification of it was possible under the testimony.

"Together with ALL." Can there be any possible doubt of the import of this language, or is any court justified in construing it so as to give it any other meaning than that commonly understood? Charles Mayger, at the time he made the bond, had the right to convey the whole of the St. Louis claim or a part of it; he could convey the surface to one grantee and the mineral to another; he could convey the surface or the mineral separately or jointly, as he saw fit. This has long been settled. Messrs. Barringer and Adams, in their valuable work on mines, say:

> "Though minerals undisturbed, or in place, are a part of the freehold, and as such usually belong to the owner of the soil, they are capable of separate ownership and distinct possession. Where there is such a severance of estates, the minerals are real estate constituting a separate corporeal hereditament, capable of distinct inheritance and conveyance. There may be further separation of the different strata, or of minerals of different kinds, each of which may have a different owner, and constitute a distinct estate in land. Moreover, the grant of the permanent or absolute interest in the minerals effects such a severance and is equivalent to a conveyance in fee of the estate in the minerals separate from that of the owner of the soil."
>
> *Barringer & Adams, Law of Mines*, 35.

The words "together with," in connection with the previous mentioned subject in a deed or power, operate to enlarge, and not to restrain, that which was previously granted.

Winter vs. Loveden, 1 Lord Raymond, 267.

Cardigan vs. Armatage, 2 Barn. & Cres., 197.

> "The words 'together with' are equivalent to the word 'also,' which means 'likewise,' 'in like manner,' 'in addition to,' and denotes that something is added to that which precedes it."
>
> *Panton vs. Taft*, 22 Ill., 166.

In the case at bar that something is clearly defined. In addition to the compromise ground, described as it was specifically by metes and bounds, there was conveyed, and the plaintiff in error here was to have, *"all the mineral therein contained."*

NO FORMAL WORDS ARE NECESSARY IN A DEED TO PASS EXTRALATERAL RIGHTS.

The Court of Appeals, in speaking of extralateral rights, says (102 Fed., 130):

> "To manifest such an intention (*i. e.*, to convey extralateral rights) the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit."

We respectfully contend that in this statement the Court of Appeals was in error, and that the law is that unless these rights are reserved in a deed by apt language, "clear and explicit," they will pass where a part of a mining claim is conveyed by metes and bounds.

It is not necessary to cite authorities to show that at common law a deed to real estate passed every interest which the grantor had in the premises described unless some interest was expressly reserved therein.

Entering into the bond for a deed in this case and the deed which the obligor in the bond agreed thereafter voluntarily to deliver were subject to the laws of the State (then Territory) of Montana, a section of which is as follows:

> "That the common law of England, so far as the same is applicable and of a general nature, and not in

conflict with the special enactments of this Territory, shall be the LAW AND THE RULE OF DECISION, and shall be considered of full force until repealed by legislative authority."

Act of June 2, 1872.

And the proposition that the common law is in force in the State of Montana unless where repealed, either expressly or by some statute in conflict therewith, has been often held.

Territory vs. Ye Wan, 2 Mont., 479.
Territory vs. Virginia Road Co., ibid., 96.
Butte Hardware Co. vs. Sullivan, 7 Mont., 312.
Palmer vs. McMasters, 8 Mont., 192.
Milburn Mfg. Co. vs. Johnson, 9 Mont., 541.
Forrester vs. B. & M. Co., 21 Mont., 544, 557.

No other deed than a common-law deed is known to the statutes of the State of Montana. We cite other sections of the statutes of the State as follows:

"A transfer vests in the transferee ALL the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or necessarily implied."

Mont. Civ. Code, § 1490.

"The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself."

Ibid., § 1491.

"A grant is to be interpreted in favor of the grantee."

Ibid., § 1473.

"A transfer of real property passes all easements attached thereto."

Ibid., § 1510.

"A fee-simple title is presumed to be intended to pass by a grant of real property."
Ibid., § 1511.

"Every grant of an estate in real property is conclusive against the grantor."
Ibid., § 1513.

We respectfully inquire of counsel on the other side what there is in the statutes of Montana or in the statutes of the United States to prevent a deed for a part of a mining claim taking effect as a common-law deed and conveying to the grantee therein named everything within the defined surface boundaries extended downward vertically. When, and where, and how has the common law thus solemnly adopted and declared been altered or changed in the State of Montana? True, extralateral rights are conferred upon the miner by an act of Congress, but after he has secured them by virtue of his compliance with the provisions of the mineral lands act they belong to him, and without question he can convey them in any way he sees fit. When he has conveyed them and what form of words are necessary to convey them are questions that can be determined only by the laws of the State in which the mining claim is situated. It follows, therefore, in the case at bar, that if the words "together with all the mineral therein contained" had not been embodied in the deed for the compromise ground the extralateral rights of the grantor in that ground, as applicable to any portion of the lode apexing within the surface boundaries of the portion of the St. Louis claim not conveyed, must pass by the deed, unless its operation in this respect was limited by apt and appropriate words in the deed or other instrument of conveyance.

If the deed in this case is taken, carefully scrutinized, and investigated, it will be found to be clear, definite, and explicit, with nothing left to interpretation or conjecture, or

to be supplied by matters *aliunde* the document itself. When the subject-matter of its grant is likewise investigated, it will be found that the title thereto is a patent of the United States issued to the St. Louis Mining claim as a location made upon the public mineral domain, without any indication anywhere in it that any portion of the lands conveyed by the patent of the Government is of different date as to its location from any other portion thereof. Under these circumstances it would seem to be in accordance with the plain, well-settled principles of law that all any court can do in determining the rights of the parties in a law action such as this is would be to find what is described by the deed and to enforce its terms. It may not, we submit, go back of the terms of the deed, nor seek elsewhere for evidence or circumstances or light for the purpose of modifying or defeating the unmistakable grant which it contains. There exists in the deed nothing which authorizes the invocation of the rule of law upon which the Circuit Court of Appeals announces it proceeded, to wit, a resort to the nature of the property and the circumstances surrounding the execution of the deed for the purpose of ascertaining its meaning. That can only be done when the terms of the deed, its contents, render this necessary in order to determine what is conveyed by it.

Van Ness vs. City of Washington, R., 4 Pet., 285.
Tiernan vs. Jackson, 5 Pet., 594.
St. Louis vs. Rutz, 138 U. S., 243.
Devlin on Deeds, 2d ed., vol. 2, sec. 836.

The same rule applies with equal force to the terms and the result of the issuance of a patent. The issuance of a patent is the final act on the part of the Government, and conclusively establishes all which is asserted thereby, certainly as against the grantee in the patent and those claiming under conveyances from such grantee.

The patent in this case is the usual patent, and there is nothing in its terms which permits, suggests, or gives an

excuse for investigating the prior history of the territory embraced within the claim as patented or controversies which may have raged, however bitterly, before its issuance, since they are terminated conclusively by its issuance.

Boggs vs. Merced Co., 14 Cal., 279.
Waterloo Co. vs. Doe, 56 Fed. Rep., 685.
Calhoun Co. vs. Ajax Co., 192 U. S., 499.
Lavignino vs. Uhlig, 198 U. S., 443, 445.
Wright vs. Dubois, 21 Fed. Rep., 693, 696.
Mining Co. vs. Tunnel Co., 196 U. S., 337, 355.
Lindley on Mines, 2d ed., vol. 2, p. 1389, sec. 778.

If the contract is resorted to, which we maintain cannot be done, since the deed is all complete in itself and makes no reference thereto, it will be searched in vain for any clause, paragraph, or syllable which suggests, indicates, or gives an excuse for supposing that the ground which it provides shall be conveyed by the defendant in error shall take date as of the location of the Nine Hour claim, while the remaining portion which is surrendered in the compromise shall take date as of the location of the St. Louis claim, and the right be retained, notwithstanding the execution of this deed, in the defendant in error to absorb, extract, and convert to its own use everything of value in the conveyed territory. The contract is as clear and explicit as the deed and as the patent. Under the same rules of law which prohibit inquiries into matters *aliunde* the deed and the patent, as above stated, like investigations and inquiries are precluded with reference to the contract. In the contract itself is found nothing dubious, nothing which need be clarified or explained, and therefore no warrant exists for going into an investigation of the considerations respectively contributed by the parties to that contract, each to the other, for that which by its terms they in return are to receive.

The Circuit Court of Appeals, however, seems to have proceeded upon a misapprehension of the facts and a mis-

conception, as we urge, of the law applicable to such cases. It appears to have proceeded upon the theory that every apex and every portion of apex confers extralateral rights; that under the law there is to be no portion of a vein the ownership of which is not dependent upon and determined by the ownership of the apex or of a portion of the apex thereof, and therefore it is made a substantial part of the argument of that court, in reaching the conclusions of which we complain, that unless the construction which it places upon the deed and the contract and the patent shall be enforced, the title to the ore in the compromise strip is not determined by the ownership of the apex of it, and the defendant in error will be found to have made a bad bargain according to the express terms of its contract and according to the grant of its deed, which it was coerced by the court into making in pursuance of its contract.

In resorting to the supposed surrounding circumstances, the court in the opinion (102 Fed., 432) says:

> "If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial and it had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary

> line, but also to divest their claim of its extralateral rights—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance under the circumstances need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient."

The court is here in fundamental error, for it is not true, as the record discloses, that if the adverse suit had gone to trial and the Nine Hour claim had prevailed to the full extent of its contention, the ground patented to the Nine Hour claim would have been that which was deeded and by the contract provided to be deeded. The area in controversy was much more extensive; it covered a larger area, it included all of the Drumlummon apex upon which the defendant in error relies for its extralateral rights. There is nothing in the record anywhere, nor in the testimony, nor in the findings of the jury upon any question submitted to them, which hints at or tends in any manner to establish the fact that the ground conveyed is all that was in dispute in the adverse litigation. The court assumes this fact, which is entirely outside of the record, and then utilizes it to put a construction upon the deed and the contract which flatly and unmistakable destroys the whole force and meaning of the words chosen by the contestants to express their meaning and which were by the court upon full investigation embodied in the deed. We do not, in urging this complete refutation of the court's position, concede that the power existed in this law action to annul the words, to vacate the contract which the parties had made, and to substitute for it something which the court argues would be necessary to fully protect the defendant in error in its supposed rights. It was for the contestants, the parties to the contract, having all the conditions which affected their controversy in mind, knowing all the surrounding circumstances, fully advised of the nature of the

property, to make their own contract, to embody it in apt language to express their meaning, and then to live up to its terms. No effort is made to reform the contract. The court says, in effect, that when a contract and deed declare in unmistakable terms that a specific piece of ground, with all the ore therein contained, is and shall be conveyed, it does not so mean; that what it means is that the grantor agrees to convey and conveys all the ore contained in the ground, which it does not own and has no right to convey, and that the very ground which it claims a right to convey, and which is therefore alone subject to its conveyance, is, without any words of exception or reservation, withdrawn from the operation of its contract and its deed.

After the Circuit Court of Appeals had announced its views upon this subject, and in order to make so plain the surrounding circumstances that no possible ground should be left upon which to base this argument, the plaintiff in error upon the new trial, offered to prove, by the introduction of the pleadings in the adverse suit, by the testimony of the locators of the Nine Hour claim, and otherwise, as shown by the record and as pointed out by assignments of error herein and the discussion of this matter under another head, that in fact the ground conveyed was not all that was in conflict in the adverse suit; that in fact the ground included in that conflict and within the Nine Hour location, and which at the time of the Nine Hour location was not covered at all by the St. Louis location, included all the apex upon which the defendant in error relied. While the court rigorously enforced the supposed law of the case and the opinion of the court above upon objections made by the defendant in error, this legitimate material and conclusive evidence was excluded. In other words, the remarkable condition was presented of a court basing its decision and a construction which overturned the express terms of a deed and a contract upon an assumed fact nowhere established by evidence in the record, and the court below, notwithstanding this was a

question of the utmost importance in the case, refusing to permit the truth to be shown upon this subject, which truth utterly demolished the foundation for this position, and the defendant in error, while clinging to and seeking to have the advantage secured by it upon this decision based upon an erroneous hypothesis and coining it into thousands of dollars, strenuously opposed the ascertainment of this same truth which would be so destructive of its contentions. But notwithstanding this ruling, erroneous, as we maintain, and which leaves us free to utilize the evidence offered for the purpose of this discussion as though received, the record discloses that in fact the court proceeded upon an erroneous hypothesis in assuming that the contract and deed gave or undertook to give to the plaintiff in error all the ground in conflict. Nor is it, we submit, a sound conclusion or statement of the law that surface rights only are determined in adverse litigations. In these litigations there is determined the title and ownership of the claim, and that includes the surface and all veins having their tops or apexes within the surface of the boundaries of the claim, and, as this court has adjudged, in the event that an enforceable extralateral right does not exist in some other claimant, the ownership of all ores that are found beneath the surface of the claim adjudged in the adverse proceedings to the one litigant or the other.

But we further urge that, where parties are in litigation and settle that litigation, it is for them to determine what consideration each shall confer upon the other for that purpose, and that when their contract plainly states that consideration and their conveyances grant that which is contracted to be conveyed in a law action in which the validity of the conveyance and the contract is not disputed and their terms are not sought to be reformed, no inquiry into the wisdom, propriety, justice, or probability of persons taking the action which has been in fact taken can be entered upon. That it is thus written in the contract, that it is thus con-

tained in the deed, is and must be the limit of the inquiry. We submit that this deed and this contract are to be taken according to their terms, and that it is immaterial, in ascertaining their meaning, whether they are the result of a compromise of previous controversies or whether for the first time the grantee became connected with the property by the conveyance to him of the property described in his deed and for a consideration paid in money to the grantor.

The court considers a compromise as a concession by the St. Louis Company that the claim of the Nine Hour claimants was right, and, proceeding upon its erroneous assumption that the ground conveyed is all that is in dispute, proceeds to treat the ground conveyed as a part of the Nine Hour claim and as of junior date to the location of the St. Louis claim. We discuss the last feature of this proposition under another head, but desire here to call attention to what we believe to be an error on the part of the Circuit Court of Appeals with reference to the nature of a compromise and the result of the position taken by the Circuit Court of Appeals upon the respective rights of the parties in this litigation.

In 102 Fed., 432, the Circuit Court of Appeals said:

> "The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis was surveyed and encroached upon their territory. They base their adverse action upon that contention. The compromise was an admission that their claim was just."

The pleadings which disclosed just what the plaintiff in error claimed were excluded by the Circuit Court at the instance of defendant in error, and that action was approved by the Circuit Court of Appeals. There is no ground upon which the court can base this statement of what the plaintiff in error claimed, and the statement, as we have shown, is incorrect.

We again call attention to the fact that the court here

misconceives the nature of the controversy between the two claims. It was not merely the position of a boundary line of the St. Louis claim, but the ownership, the prior valid location of the ground described in the conflict, with all the rights appertaining thereto, which were acquired by location or would pass by a patent of the Government therefor. Is it conceivable that after the trial of an adverse suit in which it is adjudged that A is the owner of the disputed territory and gets a patent from the Government therefor, that all he has established as against his contestants is the position of a surface line? Is there not also settled their respective claims of location and ownership of this territory and of all rights connected with it? The parties in this litigation did not respectively concede that the other was right. The St. Louis Company did not concede that the Nine Hour had a right to all the property to which it asserted title in the adverse suit. It entered upon negotiations with reference thereto and agreed that if the Nine Hour owners would permit the St. Louis claim to be patented in its entirety, would yield up all claim to the ground in conflict save the portion which was agreed to be conveyed to the Nine Hour owners, it would proceed to patent this territory, and when it was patented would convey the ground described in the deed—not all that was in conflict, but this lesser portion—by deed which, describing the property by metes and bounds, would convey all that territory and all the mineral therein contained, as shown by the terms of the deed itself, under the patent title it obtained for it, as a part of the St. Louis claim. The meaning and the language of the contract was, and the deed is, that in consideration for that which it received it would make this conveyance, and would so make it that, absolutely and forever, any claim it made to anything within the territory was extinguished and every right and interest in all ore therein should be the property and be conveyed to the owners of the Nine Hour claim. It is because of a fancied equity, based upon a wholly mythical foundation,

that the court has been misled into what seems to us a clear misinterpretation of the rights and the conduct, the contract, and the deed of the parties. By this contract it was agreed that, in consideration of surrendering much which it claimed, the Nine Hour owners should not only have the ground conveyed, as we have stated, but should have it as a part of the St. Louis claim, with all benefits of the date of the location of that claim which it would have in the hands of any grantee of the St. Louis owners after they had patented it as a part of the St. Louis claim.

A compromise does not concede that the other party is right; and we maintain as a legal proposition that the Circuit Court of Appeals is in error [illegible] says: "The compromise was an admission that th[illegible]n was just." Our position upon the compromise and [illegible] doctrine announced by the court is that a compromise does not concede or acknowledge that either party is wholly right, and surely does not permit either party to it to maintain such a position for the purpose of defeating the grant it made as its consideration for what it received under the compromise.

Webster's Dictionary thus defines "compromise:"

> "2. An amicable arrangement between parties in controversy to settle their differences by mutual concessions."

In *Smith's "Synonyms Discriminated,"* at page 62, there is a discussion of the history of "compromise," its etymology and meaning, and so far as it is applicable to what we are here investigating it states the meaning of the word as follows:

> "At present the spirit of compromise is that of forestalling judicial or authoritative decision by timely concessions, a taking and giving on both sides."

The *Century Dictionary* defines "compromise" as follows:

> "2. A settlement of differences by mutual concessions; an agreement or compact adopted as the means of superseding an undetermined controversy; a bargain or arrangement involving mutual concessions; figuratively, a combination of two rival systems, principles, etc., in which a part of each is sacrificed to make the combination possible."

> "O, glorious league!
> "Shall we, upon the footing of our land,
> "Send fair-play orders, and make *compromise*,
> "Insinuation, parley, and base truce,
> "To arms invasive?"
> *Shake., K. John,* v. 1.

> "All government is founded on *compromise* and barter."
> *Burke, Works,* II, 169.

> "It cannot be too emphatically asserted that this policy of *compromise*, alike in institutions, in actions, and in beliefs, which especially characterizes English life, is a policy essential to a society going through the transitions caused by continued growth and development."
> *H. Spencer, Study of Sociol.,* 396.

Similar quotations may be made from all the dictionaries of authority and like quotations from other authors.

I Beauvier's Law Dict., 308:

> "*Terms de la Ley:* Compromise is a mutual promise of two or more parties that are at controversie."

In *Huddersfield Bank vs. Lister,* II Chan., 285 (1895), Kay, L. J., says:

> "A compromise takes place where there is a question of doubt and the parties agree not to try it out but to settle it between themselves by a give-and-take arrangement."

The Civil Code of Louisiana, article 3071, defines a compromise as an agreement between two or more persons who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent in a manner which they agree on and which every one of them prefers to the hope of gaining balanced by the danger of losing.

Sharp vs. Knox, 4 La., 456, 460.

In *Attrill vs. Patterson,* 58 Md., 226, 245, it is said:

> "To compromise is to adjust a dispute by mutual concession. To negotiate means substantially the same thing—to effect something or an effort to effect something by a treaty or agreement. Negotiations and compromises exclude the idea of actual resort to hostile litigation."

As of like effect, see the following cases:

Landa vs. Obert, 25 S. W., 342, 346.

Continental National Bank vs. McGeoch, 92 Wis., 286.

Rankin vs. Schofield, 70 Ark., 83.

Gregg vs. Town of Weathersfield, 55 Vt., 385, 387.

Bellows vs. Sowles, 55 Vt., 391, 399.—In this case the court said that a compromise "is the yielding of something by each of two parties and can only exist when something is yielded by each party to it."

Colburn vs. Town of Groton, 66 N. H., 151.

The word "compromise," then, means—and was used in this sense by the owners of the Nine Hour claim and the St. Louis claim in their contract, wherein they speak of making a compromise (Record, p. 9)—an adjustment of differences by mutual concession, in which the concession of each is the consideration for the concession of the other, and in which neither party concedes that the other is wholly right, or perhaps does not so concede at all. The compromise

effects a disposition of the controversy in which neither party surrenders his entire claim and in which each takes something as a result of the adjustment. This is what the contestants did in this case. They compromised. The Nine Hour claim yielded up a part of its contention, its contention being that it owned, by superior title and prior location, all the conflict between the two claims, and the St. Louis Company yielded up its claim that it had the better right to the entire conflict, and the St. Louis Company was authorized to patent as a part of the St. Louis claim this conflict, permitted to retain all except the 30-foot strip, and required to deed that strip, with all the mineral therein contained; so that, as a consideration for the concessions and surrenders made by them, the Nine Hour claimants would have this ground, with all the mineral contained in it, unaffected by any claim of right thereto by the St. Louis Company on any ground whatever. It would be inconceivable that a compromise in this sense had been made, the effect of which was that the Nine Hour yielded up all of value involved in the controversy. When the true situation is considered, as the record now discloses it, the very argument upon which the Circuit Court of Appeals based its decision annulling the contract renders that annulment an impossibility. The decision of the Circuit Court of Appeals was that the interpretation of the deed which carried out its plain language would result in giving to the Nine Hour claim something which it would not have had if it had succeeded in obtaining all the ground in conflict, and for this reason the court in effect set aside the direct, plain, and unequivocal language of the contract because, as it seems, it thought the result which it refused to adjudge could not have been intended by the parties to the agreement; not that they had not so expressed themselves, but because the court thought it not probable that they should have so expressed themselves. When it is seen, as now, that to enforce literally and absolutely the exact terms of the deed and the contract does not

accomplish this reprehended result, but merely gives to the Nine Hour claim the little 30-foot strip of compromise ground, with all the ore therein contained, while leaving the ownership of the remainder of the ground in controversy in the defendant in error subject to the terms and controlled in that ownership by the express provisions of the contract and the deed, no support is left for the argument which controlled the decision of the Circuit Court of Appeals.

As the case now stands, the Circuit Court of Appeals was in error in its assumption of fact, and the case before it upon the second hearing was not the case the court decided when the case was first there, and hence the Circuit Court of Appeals upon this second hearing, upon its own reasoning, changed its decision and announced a different result. It seems, however, to have felt itself bound by what it had before adjudicated as being the law of the case until reversed, and to have held in effect that no relief could be obtained, notwithstanding the error of fact into which it had fallen, save by a decision of this court.

Is it not clear, then, upon a consideration of all the facts and the true relations of the parties and the terms of their contract and deed, that the rights under the contract were just as the contract provided for, and that for the consideration which was paid to the grantor the grantee was to have deeded to it the designated territory as patented, with all the rights as to seniority coming from being thus patented? For the surrender of territory it took title as against its grantor and all the world, just as the St. Louis Company held it under the patent before it made its deed. What was the ownership, what the title, what the date of the location of this deeded ground when owned and held by the St. Louis Company, and what would they have been with this title in the St. Louis Company had it succeeded in defeating the suit for specific performance or had the Nine Hour claim by some agreement surrendered its demand and claim for a deed? As a matter of law, upon the theory of compromise,

our position would be correct upon the real facts as they are now disclosed, and also upon the law of contracts. It would be true, for the contract contains nothing to the contrary and nothing requiring or permitting explanation or interpretation. Unless by some specific agreement in legal, binding form to that effect, the parties could not go back of the title as defined by the patent and the deed, for by conclusive presumption the patent settled the title and shut the gate upon inquiry back of it, and nothing short of a radical misconstruction of the contract would permit inquiry as to what had preceded its making.

It is said that the plaintiff in error claimed the ground conveyed to it as Nine Hour ground and asserted right to it by virtue of its location of it as Nine Hour ground. This is true. But in connection with that assertion it also contended and asserted that it was not only entitled to it as Nine Hour ground, but that the Nine Hour claim was superior to the St. Louis claim, prior in valid location as to this and other territory, all the territory in dispute, so that if its contention is to bind it, there must be given to it the full benefit of what it contended for, and this would establish the seniority of the Nine Hour location as to all of the ground in controversy and would make it impossible, upon the theory adopted by the Circuit Court of Appeals, for the St. Louis claim, with a portion or all of the width of the apex, to take the entire vein upon its dip in its extent through the 30-foot strip.

It must also be remembered, on the other hand, that the St. Louis claim contended and asserted that all the ground in conflict, including the 30-foot strip, was St. Louis ground, and that it only yielded up this claim or modified it or agreed so to do because, as it asserts, of a controversy which it claimed was unjust, and therefore it virtually took the position that it had given a part of the St. Louis claim in purchase of peace.

But, however these contentions may be regarded, they were all merged in the contract. They were swallowed up

in the compromise. They made the final result to be that this ground here in question was patented as St. Louis territory, and that it was agreed that when thus patented it should be conveyed to the Nine Hour people in settlement of the contentions theretofore existing between them, and which were thereby terminated, with the result that even if there had not been contained in the contract and in the deed the words "including all the ore contained in the compromise," the necessary legal effect of the contract and the deed would have been to convey it. If the deeded part was not a portion of the St. Louis claim, then this must be true as to the undeeded portion of the conflict, for the contention of the Nine Hour claim was not merely for the compromise ground, but for the conflict area, and that, therefore, would have been that the portion which is retained by the St. Louis claim, and in which their portion of the divided apex is found, and all the apex upon which they rely in this litigation, was Nine Hour ground and identical in date of location with that which was deeded, and the result is then the same. There is no seniority of the ground owned or obtained by the St. Louis Company over that conveyed to the Montana Company, and the theory upon which extra-lateral rights are asserted disappears.

If the whole matter of controversy and contract may be opened up—and this seems to be what was done by the Circuit Court of Appeals and the Circuit Court in reaching the result of which we complain—the record discloses the fact to be that no part of the conflict ground was embraced in the St. Louis claim at the time the Nine Hour claim was located, and therefore the Nine Hour location was older than the St. Louis as ground in conflict, and all the ground in conflict was first located by the Nine Hour claim when it was included in the Nine Hour location.

The contention that the ground deeded was deeded as Nine Hour ground while the ground retained was retained as St. Louis ground, and the mere fact that the date of the

location of the St. Louis claim was prior to the date of the location of the Nine Hour claim, and that these facts might be proved notwithstanding the contract and the patent, and resulted in a determination of seniority in the ownership of the respective portions of the apex, is an untenable position and is a mere begging of the question in argument. It is thoroughly settled by this court that the mineral statutes are a part of the patents issued by the Government, and that if the patent is broader in its grant than are the rights provided for by the statute, the statute shall be read into the patent and the patent narrowed down to the statue; and if the patent is narrower in its grant than the rights which the statute provides shall be secured by a location, the statute is read into the patent and the patent expanded to the extent and limits of the statute. In effect, that it is always in these controversies the statute and not the language put into the patent by the agents of the Government which is to be construed; that the patent is the statute and may not be construed or considered apart from or in conflict with the statute upon which it is based.

> *Morrison's Mining Rights*, 12th ed., p. 132; *Lindley on Min. Law*, 2d ed., secs. 171, 575, and cases cited in the notes thereto.

In *Deffeback vs. Hawke*, 115 U. S., 392, 406, this court said:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance with the recitals showing the compliance with the law and the conditions which it prescribed."

In *Davis vs. Weibold*, 139 U. S., 527, this court said:

> "But we do not attach any importance to the exception (referring to the exception in the patent), for the officers of the Land Department, being merely agents of the Government, have no authority to in-

sert in a patent any other terms than those of conveyance, with recitals, showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department resting for their fitness only upon the judgment of those officials." (*Deffeback vs. Hawke,* 115 U. S., 392, 406.

These decisions and authorities in what has preceded we believe are conclusively determinative of this subject and show that the plaintiff in error is entitled to all the ore contained within the 30-foot strip, in whatever veins found, wherever the apexes of the veins in which it is contained may be, as against the defendant in error under its deed. If they are not, it is because it is to be taken that nothing is determined by the patent beyond the fact that the St. Louis claim should patent the ground and by the contract should convey this portion of it, leaving the relative ages of the St. Louis and Nine Hour claims open to investigation and trial at any time either party should assert some right based upon its ownership there which the other resisted. This theory finds no countenance in the contract, which does not attempt to affect the operation and result of the statute. The contract provides for nothing of this character and leaves the situation just as it would be if a conveyance had been made of the patented ground without the contract and for a consideration alien to the whole controversy.

VII.

WHERE THE APEX OF THE VEIN CROSSES THE BOUNDARY LINE OF A CLAIM AT AN ACUTE ANGLE, WHERE SHALL THE LINE MARKING THE EXTRALATERAL RIGHTS BE DRAWN DOWN?

WHEN BUT A PORTION OF THE WIDTH OF AN APEX IS WITHIN A CLAIM, MAY IT BASE EXTRALATERAL RIGHTS THEREON?

MAY A CLAIM HAVING BUT A PORTION OF THE WIDTH OF AN APEX WITHIN IT ASSERT EXTRALATERAL RIGHTS THEREON AND TAKE THE ENTIRE WIDTH OF THE VEIN FROM THE SURFACE DOWNWARD? .

WAS THE PORTION OF THE WIDTH OF APEX RETAINED IN THE ST. LOUIS CLAIM PRIOR IN DATE OF LOCATION TO THE PORTION IN WIDTH THEREOF CONVEYED TO THE PLAINTIFF IN ERROR?

MAY THE COURT IN THIS CASE INQUIRE, IN VIEW OF THE CONTRACT, THE PATENT, AND THE DEED MADE BY THE DEFENDANT IN ERROR TO THE PLAINTIFF IN ERROR, INTO THE RELATIVE AGES OF LOCATION OF DIFFERENT PORTIONS OF THE TERRITORY EMBRACED IN THE PATENT OF THE ST. LOUIS CLAIM, OR TREAT THE COMPROMISE GROUND AS OF THE DATE OF THE NINE HOUR LOCATION AND THE REMAINDER OF THE GROUND HELD BY THE DEFENDANT IN ERROR AS OF THE DATE OF THE ST. LOUIS CLAIMED LOCATION?

ASSIGNMENT OF ERRORS NOS. VI, XXVIII, XXXV, XXXVI, AND XL TO XLVIII, INCLUSIVE.

In the second paragraph of the complaint it is alleged that it (the St. Louis Company) is also the owner of, in

possession, and entitled to the possession of an additional portion of said apex of said claim lying to the south of the southern point hereinbefore mentioned a distance of twenty-five feet, whereat the foot-wall of the said vein passes out of the side line of the said St. Louis Lode mining claim. Here is an allegation of the ownership of a portion of the apex of the Drumlummon vein, but there is no claim, either expressed or implied, in this that it is entitled to the mineral found in the compromise ground, which, as we have already seen, it has admitted in paragraph II of its complaint was the property of the plaintiff in error. If it were only claiming such mineral as was to be found in the surface boundaries of its claim and in its claim west of the west line of the compromise ground, such claim would be in entire harmony with the admission previously made in its complaint. There was mineral from the 108 to the 133 foot plane to which it was entitled, but it was such mineral and such mineral only as lay to the west of that line drawn down vertically. We respectfully submit that under the well-established rules for the construction of pleadings to which we have already referred this language must be construed in this way; otherwise it would create a repugnancy. On the first trial of this case, as already stated, the Circuit Court limited the recovery to the ores found north of the 108-foot plane; in other words, to the point where the St. Louis Company had the whole of the apex within its surface boundaries. But the Circuit Court of Appeals in its decision in the 104 Federal, page 664, holds that this was error, and, as already stated, the case was reversed for this reason and ordered sent back for a new trial.

Waiving for the time being the proposition that no claim of ownership is anywhere set up in the complaint upon which the case was being tried of any ores in the compromise ground, we respectfully suggest that, so far as this question is concerned, the Circuit Court was right in its decision and the Court of Appeals clearly wrong.

In order to support the theory of the Court of Appeals the words "top or apex" as found in section 2322 of the Revised Statutes would have to be construed as reading "top or apex, or any part or portion thereof." In the case at bar it is manifest that as soon as the hanging wall crosses the westerly line of the compromise ground the defendant in error has not the whole of the top or apex of the Drumlummon vein on its side of the line. Proceeding southerly along the west side of the compromise ground, it has less and less of the apex until it reaches its 133-foot plane, where the foot wall crosses the line, at which point no part of the apex is within its surface boundaries. In order, therefore, to give it extralateral rights under the section of the mineral lands act cited it is necessary to read into that section the words we have suggested above—"the top or apex, or any part or portion thereof." This, we respectfully suggest, is beyond the power of the court to do.

> "Beyond the terms of the statute courts may not "go. They have no power of legislation. They can- "not assume the existence of a ny natural equity, and "rule that by reason of such equity, a party may fol- "low a vein into the territory of his neighbor, and "appropriate it to his own use. If cases arise for "which Congress has made no provision, *the courts "cannot supply the defect.* Congress having pre- "scribed the conditions upon which extralateral rights "may be acquired, a party must bring himself within "these conditions or else be content with simply the "mineral beneath the surface of his territory."
>
> *Del Monte M. Co. vs. Last Chance M. Co.*, 171 U. S., 55, 66.

We turn aside for a moment to call attention to the fact that the language just quoted is specially applicable to this case. The St. Louis was located nearly two years before the Nine Hour. The country was all open to Mr. Mayger at that time. He could then have laid the lines of his claim over

every foot of the territory afterward taken as the Nine Hour so as to include the great Drumlummon vein within his surface boundaries. He did not do it; he did not get a foot of it within his lines. When he surveyed for a patent he fraudulently included about six hundred lineal feet of that vein within his surveyed lines by wrongfully extending the east line of his St. Louis claim over the Nine Hour ground. By another fraud he succeeded in locating the westerly side line of the compromise ground forty feet six inches instead of fifty feet from the center of the Nine Hour discovery shaft, as called for in the bond. Out of this territory he has got, as this record shows, one hundred and eleven thousand dollars ($111,000). He ought to "be content with simply the mineral beneath the surface of his territory."

We quote again from *Del Monte M. Co. vs. Last Chance M. Co., supra,* as follows (p. 60):

> "The general rule of the common law was that "whoever had the fee of the soil owned all below "the surface, and this common law is the general "law of the States and Territories of the United "States, and in the absence of specific statutory "provisions or contracts, the simple inquiry as to "the extent of mining rights would be who owns "the surface."

There can be no controversy over a proposition so broadly and clearly stated. The mineral lands act, in so far as it gives extralateral rights, is an innovation upon this fundamental principle of the common law. By section 2322 of the Revised Statutes it has given this right to pursue a vein extralaterally beyond the side lines of a claim extended downward vertically only where the top or apex is within the boundaries of the claim, and it does not give it where only a part of the top or apex is thus within the surface boundaries of such claim, nor can the courts, by reason of the fact that the mining claim asserting this right of extra-

lateral pursuit is older in point of time than the mining claim whose territory is to be thus invaded, confer such right by construction. To do so would be to alter the common law in this respect beyond the import of the statute.

> "No statute is to be construed as altering the com-
> "mon law further than its words import. It is not
> "to be construed as making an innovation upon the
> "common law farther than its words import."
>
> *Shaw vs. Merchants' Nat'l Bank,* 101 U. S., 557, 565.
>
> *Sullivan vs. La Cross Steam Jacket Co.,* 10 Minn., 386.
>
> *Wilbur vs. Crane,* 13 Pick., 284.
>
> *Dwelly vs. Dwelly,* 46 Me., 377.
>
> *Jasper Trust Co. vs. Kansas City et al. R. Co.,* 42 Am. St. Rep., 79.

2. Another reason why the Court of Appeals was in error in drawing the bounding plane down at the 133-foot point instead of at the point where the hanging wall crosses the line, or the 108-foot plane, is that allowing the defendant in error extralateral rights between these points *is giving it the vein on its strike as well as its dip.* It is respectfully submitted that nothing in the act or in any decision can be found warranting such a conclusion.

3. Another reason which seems to us still stronger is that if the bounding plane is to be drawn at the 133-foot point it in fact gives to the defendant in error a triangular portion of the SURFACE of the compromise ground approximately containing one hundred and eighty-six square feet. While this action was one of trespass for ores mined out by the plaintiff in error, we think we may assume that it ought not to be allowed to recover for any ores which it might not itself have mined out. At this point, and on this portion of the lead, the valuable ores come approximately to the surface. Says Mr. Mayger: "The entire vein is stoped out

between the 108 and the 133-foot planes from the *surface* to the 190-foot level of the Montana Company's works" (Record, p. 25). And Mr. Parks, their engineer, says: "I have a block No. 1, the stope south of the north line of the Montana Company's apex shaft to the 133-foot plane, and from the *surface* to the instrument at K" (Record, p. 36).

This court has decided that this right can be exercised only in one way, and that is by following the apex of the vein on its dip into the adjoining territory, and that the party claiming all lateral pursuit of a vein which has its apex within its own territory cannot do so by driving a tunnel or level horizontally into the vein.

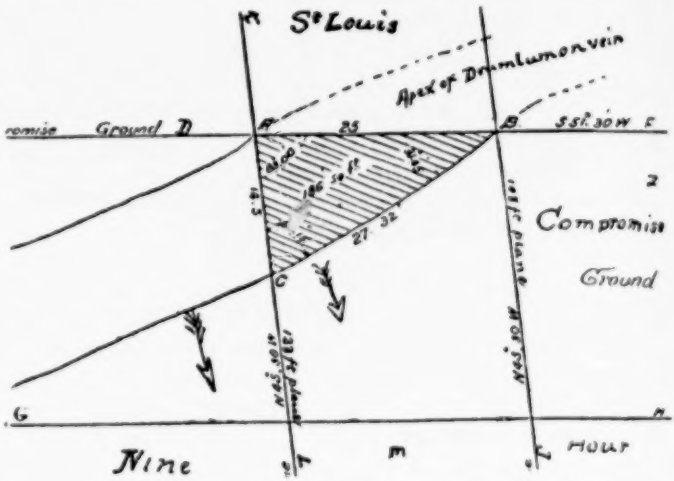
> *St. Louis M. & M. Co. of Mont. vs. Montana Ming. Co., Ltd.*, 194 U. S., 235.

There was therefore no method by which the defendant in error could itself have mined out this ore except by going upon the surface of the compromise ground and taking possession of so much of it as was requisite to follow the vein on its dip between its two planes. The very section of the mineral lands act which confers the right of extralateral pursuit of a vein forbids the appropriation of any portion of the surface in the exercise of this right. We quote from section 2322, United States Revised Statutes, as follows:

> "And nothing in this section shall authorize the "locator or possessor of a vein or lode which extends "in its downward course beyond the vertical lines of "his claim to enter upon the surface of a claim owned "or possessed by another."

By reference to the patent from the United States issued to the defendant in error for its St. Louis claim (Record, p. 40) it will be seen that it contains, as do all mineral land patents, a proviso or reservation in strict conformity with this provision of the law. The diagram hereto attached shows the angle at which the Drumlummon vein crosses the

west line of the compromise ground, the length for which the vein would be taken on the strike, and the form and the amount of the surface which would be taken away from us under the decision of the Court of Appeals, as reported in 104 Federal, 664. It is from a photograph of a map marked



"Defendant's Exhibit —," drawn by the witness Farmer, testified to by him as being correct, and introduced in evidence on the trial.

The triangle A–B–C shows distance taken on the strike of the vein and the surface taken. The line D–F is the west line of the compromise ground, and the line G–H its east line. The line I–J is plaintiff's 108-foot plane, and the line K–L its 133-foot plane.

This case brings to this court for the first time, so far as we are advised, the question of whether a split or divided apex confers extralateral rights upon a lode mining claim in which a part of the width of the apex is contained, and especially when the splitting of the apex occurs as in this

case. The question has arisen in a number of cases in different courts, and different results have been reached with reference to it. In the following cases it has been held that nothing less than the inclusion within the claim of the entire width of the apex confers extralateral rights:

Equator Lode vs. Colorado Central Lode, 11 Fed., Cas. 5931.

Turck vs. Colorado Central, 50 Fed. Rep., 888; 54 Fed Rep., 262.

In the tenth edition of Morrison's Mining Rights, at page 135, the controversy upon this subject is stated as follows:

> "In the controversy between the Equator lode and the Colorado Central lode, in the U. S. court at Denver, the lode was admitted by both parties to be, at the point of conflict, over 100 feet wide. Each claimed under a patent conveying a surface of 50 feet, the Equator covering the southern portion of the apex and the Colorado Central the northern. The court held that in such a case each party could hold only to its side line, and divided the lode by extending the south side line of the Colorado Central patent vertically downward through the lode.
>
> "In the case of Bullion Co. *v.* Eureka Co., 11 Pac., 515, the Supreme Court of Utah were divided, two judges holding that covering a part of the apex, gave a right to the dip, and the dissenting judge following Hall *v.* Equator Co.
>
> "All apex rights are a departure from the common law, and should therefore be strictly construed. The holding in the Equator case, as far as we know, has been uniformly followed by the *nisi prius* courts, and we cannot doubt that it is a correct application of the statute to the subject-matter.
>
> "The reasoning in the Stone Lode case, 14 M. R., 641, and the Amy Silversmith case, 152 U. S., 222, all tend to confirm this view, to wit: That the survey must cover the whole width of the apex to entitle it to extralateral rights."

In section 583, Lindley on Mines, first edition, and the same section in the second edition, will be found a statement of the controversy and extracts from authorities and decisions, to which we refer as illustrating the nature of the controversy and what has been held by different courts with reference to it.

In Barringer and Adams on Mines and Mining, page 442, we find the following:

> "And it has been held in Utah that this ownership extends to the entire width of the vein, even where the width of the apex is such as to extend beyond the side lines of the claim. It is hardly to be supposed that this will be followed elsewhere."

In *Fitzgerald vs. Clark*, 17 Mont., 100, the second assignment of error in the Supreme Court of Montana was as follows:

> "The court instructs the jury that if the whole apex of the Niagara vein or lode appears at any point within the surface location of the Niagara claim, then the respondent had the right to follow it on its dip beneath the surface of the Black Rock claim."

The jury found that the apex of the vein in controversy was entirely within the lines of the Niagara lode.

17 Mont., 103.

It seems that exceptions were not properly saved to the instruction, but the Supreme Court considered them on objections to the insufficiency of the pleadings, and the judgment of the court below was affirmed. The case was carried on writ of error to this court, where it was again affirmed.

Fitzgerald vs. Clark, 172 U. S., 292.

Colorado Central Consolidated Mining Co. vs. Turck, 50 Fed. Rep., 889, was a case in which the apex was split or di-

vided upon its strike—that is to say, the question was whether an apex *thus divided conferred extralateral rights*, and Judge Hallett, in his charge to the jury, held and instructed them that it did not.

Under the circumstances, we desire to call to the attention of the court, in addition to what we have above presented, some other matters bearing upon the proper construction of the federal apex statute.

By the act of May 10, 1872, following a policy foreshadowed by the act of July 26, 1866, the Government dealt with the mineral lands as lands, and did not treat the lodes as divorced or separated from the lands in which they were contained.

United States Revised Statutes, section 2318, reserved from sale, in all cases except as directed by law, "lands valuable for minerals."

Section 2319 provides that the valuable mineral deposits in surveyed and unsurveyed public lands shall be free and open to exploration and purchase, "and the lands in which they are found to occupation and purchase * * * ."

United States Revised Statutes, section 2325, defines the methods to be pursued in securing patent for "any land claimed and located for valuable deposits."

United States Revised Statutes, sections 2318, 2319, and 2325, furnish the provisions, under the Mineral Land Act of the United States for obtaining patents to mineral lands.

The extralateral right of a lode locator, as conferred by the federal statute, depends upon a compliance with the law, and until and only so far as he complies with the law is he entitled to the assertion of any extralateral rights by virtue of the location of a lode mining claim. He may have within his claim the apex, and yet, if the end lines are not parallel, may not follow it upon its dip beyond the surface boundaries of his claim. The location of a claim does not give necessarily any extralateral rights whatever. This was decided in the Amy Silversmith case by this court, in the Stone Lode or

Horseshoe case, and in other decisions, notwithstanding the apex as to its entire width was included in the locations.

Not only does the existence of the extralateral right depend upon a compliance with the law, but, as above indicated, the law conferring it is strictly construed.

Del Monte vs. Last Chance, supra.

With this as preliminary, and thus briefly adverted to, because it is elsewhere more fully stated, the inquiry is, Upon what ground may it be contended that where but a portion of the width of an apex is within a claim, the claim is entitled to the entire width of the vein upon its dip or descent into the earth, although a greater portion of the width is included in some other location? There is nothing in the statute itself which so provides. The defendant in error takes the position that it has a right to the whole vein where it has none or only a part of the apex, and up to where it has the whole in width, as illustrated in the map found at page — of this brief. In other words, the full width of the vein and apex where the apex lies, as in the triangle in the Nine Hour thirty-foot strip, is to be acquired and the apex rights as to the ore in the portion of the vein which it covers given to the ground that does not contain it. This is the condition, of course, wherever an apex crosses a side line at other than right angles. The question, therefore, is a general one, and of importance, for if the vein is of any width, and the difference in direction of the side lines of the claim is not great, the question may apply to large quantities of valuable ore, as is the fact in the present case.

The claim of the defendant in error gives an apex where there is none of the width of the apex within the St. Louis claim, up to the point where the whole of it is within the claim. The statute provides that these extralateral rights shall be had by the locators of claims when they comply with the law, where the apex, meaning necessarily the whole

of the apex, is in the location. The language of the statute is (sec. 2322):

> "The locators of all mining locations * * * so long as they comply with the laws of the United States * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth *the top or apex* of which lies *inside of such surface lines extended downward vertically*, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to *extend outside* the vertical side lines of such surface locations. But their right of possession to such *outside portions* of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction, that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter *upon the surface* of a claim owned or possessed by another."

The plain meaning of this statute, it seems, would be that when the apex, the top of the vein, is "inside" the boundary lines of the location, the extralateral right is conferred, notwithstanding the vein upon its dip may so far depart from a perpendicular as to pass "outside" of the side lines of the claim. Two features are prominent in the language of this statute: That the top or apex is inside of the claim; that upon the dip the vein passes outside of the side lines of the claim. This does not mean when a small part of the top or apex is inside of the claim, but necessarily means, since there is no limiting language contained in the statute, when all or the whole of the top or apex is inside the claim. If this is not true, then there must be imported into the statute, for the purpose of granting extralateral rights, words and a

thought not present therein. This will not be done, because this statute conferring a right upon the owner of a location which at common law he would not possess is in contravention of that common law and will not be extended. If the location must not contain the whole of the apex within its boundaries, then how much of the apex in width must it have in order to secure extralateral rights and the whole width of the vein upon the dip and also at the surface? Can a claim be made upon the possession of a small portion of the top of the vein, perhaps an inch or two, against a greater width, many feet perhaps, in another claim? How may it be said that an apex or top is within a claim, as the statute requires it shall be, when the greater portion of it is, or for that matter where any portion of it is, outside of the claim? How does a locator under these circumstances get all the surface within his claim, and the top or apex of a vein therein, when that top or apex is taken from him, and a portion of the surface of his claim also, by the locator of another claim which did not include this surface within its boundaries and has paid nothing for it to the Government, and did not include the top or apex within such claim? Suppose that the vein has no dip or departure from the vertical, and a small portion of its apex is within the St. Louis claim, and a larger portion is within the Nine Hour claim, what is the result? Each takes so much of the vein as is within his surface boundaries extended downward vertically. Suppose that a few inches in width of the vein is within the St. Louis claim, and that for five hundred feet upon its descent into the earth it is vertical, and then at that depth departs from a perpendicular, and the whole vein passes beneath the surface of the Nine Hour claim, what are the rights of the parties? Shall the St. Louis claim take the entire width of the vein from the surface downward? Shall it be permitted to take any part of the vein which lies within the boundaries of the Nine Hour claim? If it may, upon what reasoning, what theory? And yet in effect that is what

was adjudged to the defendant in error in this case, when it was given large bodies of valuable ore, no portion of the apex of which was within its territory, simply because further on a part of the apex was within its boundaries. It seems this same idea prevails and influences the determination in those cases in which it had been held, as in this, by the Circuit Court of Appeals that a part of a divided apex is as effective in conferring extralateral rights as the whole of it; that some one must have extralateral rights by virtue of the apex of every vein which departs from a perpendicular, and that some disadvantage or loss, unjust in its nature, and therefore to be prevented, is inflicted upon the locator of a claim who does not include for any extent upon its course the entire width of the apex, if he be not given all the rights which would accrue to him, had he, in compliance with the law, the entire width or apex within his claim. It should be remembered that the disadvantages of not securing all the apex of the discovery vein, or of any collateral vein within a location, because the whole or a part of it passes out of the side line is compensated by what is given under the terms of the statute.

When the claim, and in it the lode, was located, the Government selling the land by the acre and including therein the surface of the claim and all lodes having their tops within the boundaries of the location, by statute put the real estate, the land, on the footing of other real estate, and when it had thus changed the rule and the law as to the veins, being what was located, it departed from the plain purpose of the statute up to this point by adding thereto that, as to the lodes which had their tops or apexes inside the claim, the locator might, within certain limitations and upon certain precedent conditions, have the entire vein to whatever depth it extended into the earth and notwithstanding it so far departed from a perpendicular in its descent as to pass beyond or outside of the side lines of the claim. This new, this extraordinary, right, however, is granted only upon the existence of the con-

ditions fixed by the statute. The misfortune of failing to include the apex within the boundaries of the claim has been held not to modify the rule or change the law, where the vein crosses the side line before reaching the end line.

Again, if both side lines should be crossed by the vein in its course, at right angles, no apex rights exist, because the locator has not laid his claim along the vein. We speak generally of the vein passing out of a claim, which is of course inaccurate and misleading, for the apex has never been in fact within the claim. The location never did have or contain the apex within it, and for that reason, and to the extent that it failed to include it, never had a claim or right to it or interest in it, because for some reason, or without reason, and the law does not inquire into that matter, the claim was never so located as to give the locator this right.

Many cases discuss the misfortune of a locator in not so staking his claim as to include the apex of the located vein for the entire length of his claim, but they have always resolutely and rigorously declined to give him that which he did not so include within his claim. The spirit of these decisions applies with equal force when the locator fails to include the entire width of the apex within his claim as when he fails to include the vein or apex upon the strike of the lode. The argument that unless the doctrine applied in this case is enforced the statute fails is utterly fallacious, for the fact that he has not properly located his claim is what prevents the locator from securing this right, which he does not lose, but never had.

We have called attention to the circumstances under which extralateral rights do not exist when the locator has with care included the entire width of the apex within his claim. There is no reason why he should lose or fail thus to secure this valuable right, and others should secure it who have failed, more signally than he, to so include the apex within the location as to comply with the provisions of the mining statutes. Suppose that two claims of equal date of location

equally divided in width the apex of a vein, which vein is perpendicular for a considerable depth, and then departing from a perpendicular dips under one of these two claims, which, if either, of the claims owns the entire width in depth of the vein, and upon what theory? Is there here a case in which the possession of a portion of the apex cannot confer extralateral rights? The fact that the courts have unhesitatingly denied extralateral rights where the apex was entirely within the claim demonstrates that the supposed hardship of the case, or the supposed incompleteness of the statute, or the supposed difficulty in appropriating the veins because of the situation of the apex, has not, as it should not have, controlled the interpretation of the statute or given rights to those who have not fully complied with the law. The attempt to change the language of the statute, the propriety and justice of the interpretation of it, by the argument that unless this or that position is taken, this or that right conferred, there are things which the statute does not cover and which it should cover simply presents the old sophism, to which the courts have replied so often, that they construe or apply statutes, but do not make them, and that the question is not whether a statute should or might be adopted which would cover the case, but whether the existing statute covers it.

PRIORITY.

Assignments of Error Nos. XXXV and XXXVI.

The conclusion reached by the Court of Appeals that the St. Louis is entitled to follow the vein on its dip between its 108 and 133 foot planes is based upon the proposition that it was the senior location. It says:

> "And as, where the rights of two mining locators "are apparently equal with respect to mining

> " ground, the element of priority of location is con-
> " trolling, preference being generally given to the
> " senior locator" (*Argentine M. Co. vs. Terrible M. Co.*, 122 U. S., 478-484), "the entire vein would
> " be given to plaintiff in error."

This priority rests, in part at least, upon our admission in our answer. As already stated, we admitted the first three paragraphs of the complaint and interposed a general denial to the remainder of it. The last part of paragraph 3 is:

> "The discovery, location and recordation of the
> " said St. Louis Lode mining claim, and the United
> " States patent therefor, was made prior to the dis-
> " covery, location and recordation and patent to the
> " said Nine Hour Lode mining claim."

The admission cannot be broader than the allegation. We could not deny this. The location of the St. Louis was nearly two years before that of the Nine Hour. What is meant by "recordation" we scarcely know, but we assume it must mean recording the notice of location, and if so, that was earlier than any recordation made by us, as was also the patenting. We were therefore forced to admit these facts because they were facts. But this is not an admission by any means that the part of the area in conflict agreed to be surrendered to the St. Louis was in anywise senior to that portion which we were to have under our bond for a deed. The entire area in conflict, approximately two acres, was claimed by the St. Louis, as we have already seen, as being within its boundaries as staked and recorded in its notice of location. By the agreement contained in the bond, this entire area was to be patented as St. Louis surface. Now to say that one part of a patented mining claim can have priority over another part of the same claim seems to us to involve an absurdity.

And how does priority cut any figure in determining

this question? Is it not true that if the Nine Hour, together with the compromise ground, had been discovered and patented twenty years ago, and the St. Louis was a mere location made yesterday, and a vein was found having its apex within the St. Louis claim dipping under the Nine Hour surface, would not the St. Louis have the same right to follow it as if the conditions as to title were exactly reversed?

We also beg to respectfully suggest that there is nothing to be found in the case of *Argentine M. Co. vs. Terrible M. Co.*, 122 U. S., 478-484, cited by the Court of Appeals, which warrants this construction of the mineral land act.

In 2 *Lindley on Mines*, section 287, will be found a diagram of the several claims involved in that case; of the apex of the vein and the workings thereon. And reading the opinion of this honorable court in connection with this figure is sufficient to show what was the scope of its decision. It is one of the side-end-line cases, and that is the controlling thought in the entire opinion. True, Mr. Justice Field, who speaks for the court, remarks in the outset of the opinion:

> "Assuming that on the *same vein* there were sur-
> "face outcroppings within the boundaries of both
> " claims, the vein first located necessarily carried the
> " right to work the vein."

"Necessarily" because this is the express provision of section 2336 of the Revised Statutes; as, for example: Suppose there was the outcropping of a vein on the Camp Bird and another outcropping on the Pine, and in their course downward they met and united at the point marked "Tunnel" or any point under the surface, then this condition would fall under the section above cited, and the vein from the point of intersection downward would belong to the senior locator. And we respectfully suggest that upon the principle of *expressio unius est exclusio alterius* the doctrine could not be applied to the case at bar.

In what has just preceded, we have discussed at some

length the power and right of the Circuit Court of Appeals and the Circuit Court to, in effect, vacate and disregard the patent, the deed, and the contract or bond for a deed, and believe it may be fairly contended that we have demonstrated that this cannot legally be done.

We have further pointed out that in the event the court was at liberty to disregard the writings of the parties and the patent of the Government and inquire into the true relations of the claims and the litigants, the result would be that the court, upon all the evidence introduced and upon permitting all to be introduced which was offered and legitimately bore upon the subjects, would find, among other things, that the territory in conflict in the adverse suit was more than that covered by the 30-foot strip, and that all of it was first located as a part of the Nine Hour location; that therefore, treating the claim of the Nine Hour locators as just, the result would be that all this conflict area was, as to date of location, of the same date, to wit, the date of the location of the Nine Hour claim. This being true, it is immaterial whether the ground is to be taken under the patent to be all St. Louis territory and as having the date of the location of the St. Louis claim, or all to be taken as Nine Hour territory and of date of the location of the Nine Hour claim. It must, upon the facts, be all taken as the one or as the other, or else, as we maintain must be the result, the court must simply enforce the deed and give to the plaintiff in error the title under the patent which the deed purposely and plainly conveyed to it.

If we start with the St. Louis patent as the source of the title and follow it, with the deed, from the defendant in error to the plaintiff in error, but one result can follow. All portions of the territory embraced within the St. Louis claim was patented as the St. Louis claim. The deed necessarily conveyed the title which the patent granted, as to date of location, and determined by its own contents the extent of that grant, which was not merely of the surface of the ground, but of the segment of the earth's surface, determined

by extending down vertically the surface boundaries set forth in the deed, and as to all these contents of ore veins and mineral, of whatsoever nature the same might be, all of the title and right which the St. Louis Company had thereto up to the time of the making of the conveyance of this grant covered all the ore and all titles and rights, equitable and legal, from whatsoever source derived, which the defendant in error had thereto. This deed and this title made at once, so far as age was concerned, the ground conveyed of equal date with that which was not conveyed, and also made the question of the original source of title immaterial, since whatever rights and claims and titles the defendant in error had thereto it deliberately and purposely conveyed by language which could not be made more inclusive. If, however, the contract is referred to and an attempt is made, from its terms and surrounding circumstances, to elicit something which will justify an assault upon the integrity of the conveyance and the patent and permit the defeat of the unmistakable purpose of both the search through the contract and the surrounding facts and circumstances, when all of them are considered, when the real facts are investigated, when the truth is revealed, the attempt will be an utter failure.

The contract shows that neither of the parties thereto conceded the full claim of the other to be just or their own claims to be wrong, but acted upon the true theory of compromise, to wit, that a give-and-take settlement had been made, for in the contract (Record, pp. 9-11) it is said that—

> "The consideration of this obligation is such that whereas, a certain cause now depending in the District Court of the Third Judicial District, Lewis and Clark County, Montana, * * * has been compromised and settled and the said Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana, * * * said Charles Mayger * * * hereby covenants, promises and

> agrees to proceed at once upon the application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein * * * and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to said application * * * covenants, promises and agrees to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situate in Lewis and Clark county, Montana Territory, and comprising part of two certain quartz lode mining claims known as the St. Louis Lode mining claim and the Nine Hour Lode mining claim, particularly described as follows, to wit: (here follows description), including an area of about 12844.50 square feet, together with all the mineral therein contained."

The description itself refers to the boundaries of the St. Louis claim, so that no ground for contention exists that the purpose of the contract was other than to patent all ground within the St. Louis claim as a part of the St. Louis claim, and, when title to it had thus been obtained, to convey a specified portion of it, with all the mineral therein, to the plaintiff in error. The ground was specifically treated as a part of the two locations, but with the agreement that it was to be patented as a part of the St. Louis claim, and thereupon a conveyance of this lot of ground should be made as set forth in the obligation.

In the face of this contract and of the patent obtained under and as a result of it, and in despite of the very teeth of the deed, the courts in this litigation have ripped up the entire settlement, have ignored and cast aside the compromise, ignored or construed away the language of the parties employed in their contract and in their deed, and find that there were no mutual concessions—in substance, no consideration for such agreement and deed as was in fact made; determine that while the adverse claim of the Nine Hour

was conceded to be just, all that the Nine Hour claim should have under its agreement was the surface of the 30-foot strip; that the ores in the ground which gave it all its value were not conveyed by the deed, and thereby make the last estate of that claim worse than the first. Not only this, but after thus sweeping aside the contract and the conveyance and the patent, find, without evidence to support it—and this finding is essential, in addition to all which went before—that, as to the divided apex, the territory retained by the defendant in error is prior in location to that which is deeded. If the claim of the Nine Hour was just, as the Circuit Court of Appeals found was conceded, then as to all the conflict the Nine Hour claim was the earlier and the only valid location, and the division of this disputed territory, which was in fact all Nine Hour Territory, left no possibility of seniority of any part of it over the other. If the evidence which discloses the circumstances surrounding the property and the conveyance, and which discloses the real nature of the premises, is and may be resorted to, no basis is found for holding otherwise.

As we have pointed out, it will be found that the first location of this conflict area was as a part of the Nine Hour claim, and that any location of it or any part of it as St. Louis claim was long after its location as a part of the Nine Hour claim. While holding that the patent did not fix the age of the two portions of the conflict ground, the Circuit Court of Appeals approves the action of the Circuit Court in excluding testimony offered by the plaintiff in error to show, and which would have shown and did show, that, as to all this conflict ground, it was entirely outside of and not even touching the St. Louis claim location as it was when the Nine Hour claim was located, and that hence all the conflict was located at the same time as a part of the Nine Hour claim and long before the claims of the St. Louis claim were changed so as to include or cover the conflict ground or any part of it. The necessary result is that if this disregard

of solemn written contracts, deeds, and patents may be sustained and the facts back of them resorted to, all the ground in conflict, that in which defendant in error asserts its apex as well as that conveyed to the plaintiff in error, is of the same age and of the age of the Nine Hour location; that if one part is to be taken or treated as Nine Hour because so conveyed and the other part as St. Louis because retained by the defendant in error, then in truth the Nine Hour portion is the older in location. The patent may not be invoked to establish by relation the untruth that the conflict area is, as to date of location, and against the Nine Hour claim, older than the part conveyed, when the facts are that as a part of the St. Louis claim it is younger in location and as a part of the Nine Hour claim it is of equal date in location. If the compromise fixes the rights of the locations, and a compromise concedes the justice of the Nine Hour claim, the effect is just as though the Nine Hour claim had patented in an adverse suit, in which it asserted the priority of its location, the ground in conflict, and especially that portion which was conveyed to it, and would thereby establish the real priority and superiority of the Nine Hour over the St. Louis location as to this territory.

Upon the subject of priority of location of the several portions of the ground patented to the St. Louis claim, the doctrines apply, which we have presented earlier in this brief, to the fact that a litigant may not go back of the issuance of a patent to prove the attitude of the parties to the ground involved or the respective dates of conflict and locations thereof; and also there is equally applicable hereto the doctrine that a grantor conveying title which he has secured under such patent may not go back of the patent itself and show the relative ages of the territory involved, and that the ground deeded is junior to the part which is retained.

Equally applicable to this question of priority is the doctrine, before presented, that as to the contract the same

doctrine is applicable, and that since the contract herein treats the ground in conflict retained by the defendant in error and that conveyed to the plaintiff in error as of equal dates, so it must be treated in this investigation. The form in which the contract is signed represents the final result of all negotiations, merges all which has gone before, and conclusively establishes the agreement upon which the minds of the parties have met. It is incompetent, therefore, to go into what has preceded in the way of negotiations or history, since the parties, with all this before them and under consideration, have fixed the things which are determined by their contract, and upon that contract, so phrased, they must stand.

The contract, as to the subject of priority, is so clear, unambiguous, and unmistakable that all canons of construction and rules of evidence prohibit any inquiry back of its terms. Both doctrines, therefore, which relate to the conclusiveness of the patent, of the deed and the contract, prohibit what has been done in this case in attempting to establish, and by the court in finding, that there was a difference in the ages, as located, of the several portions of the conflict area. Even had there been diversity in dates of location, they were equalized by the patent and by the contract, and this was deliberately and purposely done.

But even if this unwarranted thing is done, the analysis and proper interpretation of the contract and the deed in the light of the true surrounding circumstances and the actual relations of the parties, the result is the same, and we are back again to the plain, express provisions of the contract and deed, without any excuse for varying or any pretext for defeating them.

The Circuit Court of Appeals' construction upon the subject of different priorities would engraft upon the contract terms which are directly antagonistic to those which it contains. That construction makes the contract to read, though no words are contained in it warranting this reading and no

surrounding circumstances give countenance to it, that while the ground shall be patented as St. Louis ground and then conveyed by the patentee of the St. Louis claim as a portion thereof, it is in fact, as to the part to be conveyed, to be patented as Nine Hour ground, as of the date of that location and conveyed as a part of that claim, thus taking away a part of the grant made for the consideration which the Nine Hour owners yielded up in order that they might have just such deed as the District Court of Lewis and Clark County awarded them. The effect of this construction is to say to the Nine Hour claimants: "You shall have no ore in this ground when the apex or any part of the apex of the vein containing it is in the portion patented by the St. Louis claim and retained by that claim, because we find and determine, without evidence and in violation of contracts, deeds and patents, that the retained area which was in conflict between you is older in location than that which is granted to you." This, too, when the contract not only has—and so has the deed—a clause which, between any other contracting parties and any other grantor and grantee—and we maintain, assuredly, between these contracting parties—includes all the ore in the ground conveyed, wherever the apex may be, whatever title thereto the defendant in error may have had and has to phraseology which accomplishes this result, *ex industria*, out of a superabundance of caution, added words which emphasize and double-rivet this meaning, constituting a legal back-stitching, which prevents this attempted ripping up of the meaning of the contracting parties and establishes in the plaintiff in error title to all the mineral contained therein.

No construction which can be put upon the federal statutes concerning the patenting of mining claims to which we have above referred and concerning their locations and what is acquired thereby authorizes the action of the Circuit Court and Circuit Court of Appeals in this behalf. On the contrary, the manifestly just and proper interpretation of these

statutes is hostile to and prevents such action. The safe and just thing, therefore, to be done is to enforce the contract, sustain the deed, preserve the patent, and give to the plaintiff in error its own, viz., all the mineral in the 30-foot strip.

We respectfully submit that the element of priority is not a factor in the determination of the rights of the parties in this case.

VIII.

OFFERED AND REJECTED PROOF.

Assignments of Error Nos. VII, VIII, IX, X, XI, XII, XIII, XIV, and XV.

We confess to no little embarrassment in discussing the questions presented by our assignments of error numbered from VII to XV, both inclusive. Our theory of this case is and always was, as above stated, that every question as to the purpose, contents, meaning, force, and effect of the bond for a deed (Defendant's Exhibit "A," attached to its answer) was tried out, set at rest, and forever disposed of, as between these parties, by the Specific Performance case.

The allegations contained in the replication with reference to the intent of the parties and the words found in the bond, the judgment, and the deed were mere surplusage which should have been stricken out on motion or disregarded on the trial, and in this, we believe, this court will agree with us. If this be so, then we must confess that the testimony offered was immaterial and was properly rejected by the court. And if the court had rejected it because of this, and held that these constituted a specific and perpetual bar to the relitigation of anything within the issues of that case, then, of course, we could not be heard to complain. But we submit that the Circuit Court was retrying this case, and the Court of Appeals passed upon it upon the theory that nothing was settled as between these parties except that the

Montana Company was to have a deed for the compromise ground; that what was meant by the words "*together with all of the mineral therein contained*" had not been ascertained, nor had the character of the west line of the compromise ground been determined as to whether it was the intention of the parties that it should be a vertical line, absolutely cutting off the right of either party beyond it, or whether it should be regarded as if it were simply the westerly line of the Nine Hour—the view actually taken of it by both courts. In short, the case was tried and reviewed as if every question that was or could be raised, save and except the right to the deed, was absolutely at large.

Again, the issue made by the allegations in the replication with reference to the intention of the parties in making these instruments, the intention of the court in rendering the judgment, and the constructive denial thereof under the section of the Code of Civil Procedure of the State of Montana already referred to raised the only substantial issue there was in the case so far as pleading was concerned. They had tendered this issue in the replication, and while they made no attempt to prove anything with reference to it, we clearly had the right, upon the theory upon which the case was being tried, to show exactly the reverse, namely, that it was the express intention of the parties, not only their intention but their contract, that Mr. Mayger should not have extralateral rights in the compromise ground; that before Mr. Robinson would accept the bond for a deed and dismiss his suit and withdraw his adverse claim, he went to Mr. Toole (counsel for Mayger) with the bond in his hand and asked him two questions, and his acceptance or rejection of the bond depended upon the answers which Mr. Toole gave him; that he had been expressly enjoined by his co-owners in the Nine Hour not to make any settlement which did not give them every ounce of mineral which might be found in the compromise ground, without regard to where the apex of the lead might be in which such mineral was found; that the exten-

sion of the east line of the St. Louis over the Nine Hour ground and that the claim set up on the part of the St. Louis to own any part of the Nine Hour surface was fraudulent and outrageous, and that the surrender of about six-sevenths of the ground in controversy between them was an ample and more than ample consideration for the conveyance to them of the little strip known as the compromise ground, together with its mineral contents. If under these circumstances the defendant in error is able to recover a judgment, it would be a travesty on justice and a judicial endorsement of fraud and wrong. While we cannot contend that under well-established legal principles we were entitled to have the testimony of these witnesses, yet we do say that upon the theory upon which the case was being tried this testimony was clearly admissible and its rejection error.

As to the evidence which showed or tended to show, and which the plaintiff in error offered to introduce, that when the Nine Hour claim was located no portion of the territory it covered was in conflict with the St. Louis claim, and in fact considerable territory intervened between them, and that long afterwards the St. Louis claim changed its boundaries so as to create a conflict, to wit, the conflict upon which the adverse suit was brought, it was offered upon the theory that if anything beyond the express terms of the deed and the patent could be resorted to, clearly this must be competent and admissible, for this evidence negatived the facts upon which the Circuit Court of Appeals had based its decision, and which facts were not proved, and to prove which no evidence whatever had been introduced. If, however, these matters could be construed, as they were by the courts, upon the theory upon which the case was tried, and for that purpose reference could be made to the surrounding circumstances about the parties when the deed was made and the obligation given which resulted in it, then what the truth was as to these circumstances and these conditions certainly was the legitimate subject of evidence, and the evidence

offered was competent, sufficient, and legitimate evidence to establish those facts. It was assuredly the right of the plaintiff in error to prove that the state of facts which the Circuit Court of Appeals had assumed in its opinion as the basis thereof did not in fact exist, and thereby render it, upon the theory of the decision, an erroneous decision.

IX.

THE COURT'S CHARGE TO THE JURY.

ASSIGNMENTS OF ERROR NOS. XVIII TO XXXIV, INCLUSIVE.

We maintain that the Circuit Court should have admitted in evidence the complaint in the case of Robinson *et al. vs.* Mayger, in the original Adverse Claim suit, for what was therein claimed is the basis of a result reached by the Circuit Court of Appeals in its opinion, and, as the offer discloses, this assumed basis and assumed purpose and object of the adverse suit and the extent of area to which it relates is erroneous. If it had been admitted, this complaint would have shown exactly what territory was claimed by the plaintiff in error and upon what title or right it based that claim, and that in fact the area in conflict was 1.98 acres. Elsewhere in what precedes we have necessarily, in discussing other subjects, discussed the propriety of this ruling and this exclusion.

Again, it was error not to have instructed the jury to find for the defendant, because, as the evidence before the jury stood at that time, it disclosed that the thing which the defendant in error was seeking to recover had been by the defendant in error actually conveyed to the plaintiff in error, and, as we have elsewhere herein shown, that no right existed in the defendant in error upon which it could recover this ore by the assertion of pretended apexes or otherwise, since every right, interest, and title to this ore, to the prem-

ises conveyed and all the mineral therein contained, had been deliberately and for a valuable consideration expressly conveyed by the defendant in error to the plaintiff in error. This requested instruction raised all the questions upon this subject which we have discussed, made their determination necessary, and if they or any of them had been determined in accordance with our contentions, the result must necessarily have been that the charge would be granted and the jury instructed to return a verdict in favor of the plaintiff in error.

ASSIGNMENTS OF ERROR XVIII, XXVIII, AND XXIX.

We except especially to that portion of the court's charge (Record, p. 89) in which it tells the jury that the defendant in its answer admits the corporate character of the parties, the ownership of the St. Louis Quartz Lode mining claim as alleged in the complaint, and that the discovery, location, and patent thereof were prior to the discovery, location, and patent of the Nine Hour Quartz Lode Mining Company, and then denies generally each and every other allegation of the complaint, following which the court says:

> "The defendant's answer, then, contains affirmative allegations which are not important in this trial, and therefore no further reference is made thereto."

It seems as if we might justly feel aggrieved when, after we had had such a prolonged and strenuous fight to get a deed which conveyed to us not only the compromise ground, but every ounce of mineral it contained, and also to obtain a decree not only awarding us the ground, but forever barring the plaintiff (the defendant in error here) from asserting any interest or claim to said premises or any part thereof or to the possession of the same or any thereof, the court passes over our plea of estoppel and absolutely dismisses it from the case so cavalierly. These allegations, these facts,

are most important in a trial involving exactly the same questions as were litigated in the Specific Performance case, and as to which the judgment is a conclusive bar, not to the plaintiff's rights in the case, because it has not asserted any, but to its recovery of $195,000 for a trespass upon ground which it alleges we own and for mineral which it likewise alleges is our property.

We submit the court should have given the instructions which we asked upon this matter embraced in our assignments Nos XIX and XX; at all events, that it should have laid down to the jury the law governing estoppel and submitted the question of whether the case fell within the law so laid down or not. Again we inquire, Is this giving full faith and credit to a judgment rendered in a State court, affirmed, and affirmed finally in this court, or is it giving any faith and credit to such judgment at all?

The decision of the court virtually annulled the deed and took from the jury all consideration of whether the surrounding circumstances upon which the Circuit Court of Appeals based its opinion in fact existed; determined that the deed did not affect the controversy at all; that the split apex conferred extralateral rights; that the defendant in error might apex ore which it had expressly conveyed; that two portions of the same claim, granted by the same patent, could, by a jury in a law action for the recovery of ore, be treated and should be treated as of different ages, the one as junior to the other. It was material and relevant, we submit, to show, as the deed and contract and judgment did show, that the very thing which the plaintiff in that case, the defendant in error, sought to recover from the plaintiff in error had been by it actually conveyed away, and therefore, by every rule of law and doctrine of good morals, it was without right to assert a title thereto or to seek a recovery therefor.

The objection which we desire especially to urge to these two instructions is not only that they change the *onus probandi* from the plaintiff to the defendant, where we claim that the *onus* remains with the plaintiff, but they impose upon us a burden beyond what is imposed by law, even if the *onus* is so changed.

The court will note that we are to show that the plaintiff (defendant in error here) has no extralateral rights in the Drumlummon vein, to the *satisfaction* of the jury And again, if the plaintiff has made a *prima facie* case showing that the strike of its discovery vein is generally lengthwise of its location, then we have to overcome this presumption by proof to the satisfaction of the jury.

Of course, we do not mean to claim that by this the court meant to instruct the jury that we must prove these things to them "beyond a reasonable doubt;" but the distinction between proving a fact to the satisfaction of the jury and beyond a reasonable doubt is so shadowy and indeterminate as to make it very hard to draw. It is sufficient for the plaintiff, who has the laboring oar, to prove a *prima facie* case; but when the burden shifts, as the court thought it did in this case, then a preponderance of the testimony, according to the court below, is not sufficient, but the fact must be proved to the satisfaction of the jury. Of course, it might be that the jury would be satisfied with a mere preponderance of the testimony on this question, and then again they might not be, and under the instruction they were authorized not to find in our favor unless they found facts in our favor upon testimony which could leave no possible doubt in the mind of a reasonable man. And these questions which we are thus to prove to the satisfaction of the jury are questions difficult for us to establish and easy for the plaintiff. They are questions dependent for their determination upon physical facts in the plaintiff's

St. Louis claim, to which we have no right of entry except as trespassers or under an order of the court.

We say, first, that the burden of proof did not change at all: that it was for the plaintiff, if it had tendered an issue upon this subject, to prove that it had a discovery vein, and that it had extralateral rights on its discovery vein in the same ground and in the same direction it was claiming the extralateral rights on the Drumlummon vein.

So far as we have been able to ascertain, there is no discord or conflict in the authorities upon this proposition.

> "The fifth instruction given for appellee is erroneous and should not have been given. It informs the jury that there can be no fraud without an intent to deceive, and that unless they were satisfied by a preponderance of the evidence. * * * It was also erroneous in saying to the jury that they must be satisfied by a preponderance of the evidence. This was improper, as it imposed a higher degree of proof than is imposed by the law. The jury were only required to believe from a preponderance of the evidence, and not to be satisfied by the proofs, as the instruction requires. Satisfactory evidence almost excludes doubt, whilst belief from a preponderance of evidence does not, but leaves the balance in the mind on one side of the proposition."
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> *Ruff et al. vs. Jarrett,* 94 Ill., 475.

> "This language is too strong. Juries are required in civil cases to decide facts upon the weight or preponderance of the evidence, and this, too, where the proof does not show the fact in question to the satisfaction of the jury. In such cases the jury may find any given fact in a given way upon their judgment as to the weight or preponderance of evidence, though they may have reasonable doubts as to the real truth."
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> *Stratton vs. Central City Horse Ry. Co.,* 95 Ill., 25.
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> *Graves vs. Colwell,* 90 Ill., 612.
>
> *Herrick vs. Gerry,* 83 Ill., 85.
>
> *Wolff vs. Van Housen,* 55 Ill. App., 295.
>
> *Connelly vs. Sullivan,* 50 Ill. App., 627.
>
> *Mitchell vs. Hindman,* 47 Ill. App., 431.
>
> *Gooch vs. Tobias,* 29 Ill. App., 268.

"The court below had instructed the jury, 'Unless the evidence before you establishes to your *satisfaction*. * * * The law required Chowning to establish his allegations by the preponderance of the evidence, but the charge of the court required him to produce evidence sufficient to establish greater degree of certainty in the minds of the jury than was demanded by law, which was error, for which this judgment must be reversed."

Willis vs. Chowning, 40 S. W., 395.

"This *prima facie* case can only be rebutted by the defendant showing to your *satisfaction*. * * * In civil cases, the party holding the burden of proof is entitled to a verdict if he establishes his cause of action or defense by producing a preponderance of evidence. This preponderance may not *satisfy* the jury, but it is in law all that is required of him. For this error in the charge we are compelled to reverse the judgment."

Texas, &c., *vs.* Ballinger, 40 S. W., 822.

McGill vs Hall, 26 S. W., 132.

In the last case cited, it is said:

"In the case of Feist *vs.* Boothe, 27 S. W., 33, and Fordyce *vs.* Chancey, 2 Tex. Civ., 21 S. W., 181, the use of the word 'satisfaction' in an instruction in a civil case required too high a degree of proof, and that such instruction constituted reversible error."

"The court had charged the jury: 'In every lawsuit the plaintiff says substantially, "I know the origin and occasion of the loss of which I now complain, and will establish to the full satisfaction of the jury, by clear and convincing proof of witnesses I know of, and will introduce, that the defendant, whom I have compelled to come into this court, is responsible in damages to me for the loss."' * * * This statement of the rule is entirely too vigorous, and puts upon the plaintiff the duty of making out his case beyond a reasonable doubt, which is only

required on the part of the State in criminal prosecutions. It is sufficient in civil cases, if, after weighing the evidence on both sides, a preponderance is the one way or the other. * * * The burden is upon the plaintiff to make out his case, and he is only required to do so by a preponderance; but when he has done so he is entitled to recover."

Gage vs. Louisville, &c., Co., 14 S. W., 73.
McMillan vs. Baxley, 16 S. E. (N. Car.), 845.
Torrey vs. Burney, 21 So. (Ala.), 349.
Evans vs. Montgomery, 55 N. W. (Mich.) 362.
Schenk vs. Dunkelow, 37 N. W. (Mich.), 886.
Crabtree vs. Reid, 15 Ill., 207.
Bitter vs. Saathoff, 98 *id.*, 266.

"The court also, in stating to the jury that they should be thoroughly *satisfied* that the conduct of the auctioneer was not merely negligent or careless, was giving to them an incorrect standard as to the conclusiveness of proof. In a civil case the jury need not be thoroughly satisfied of any fact claimed to be proven. If there is a preponderance of evidence in favor of the fact, they are bound so to find, whether they are thoroughly satisfied or the proof is conclusive to their minds or not."

O'Donohue vs. Simmons, 12 N. Y. Supp., 843.
Fernandez vs. McGinnis, 25 Ill. App., 167.
Bauchwitz vs. Tyman, 11 Ill. App., 187.
Bryan vs. Chicago, R. I. & P. Co. (Iowa), 19 N. W., 296.

The fact is not to be overlooked that it was not only in those portions of the court's charge to which we have especially called attention by our assignments of error above mentioned, but the same fault runs throughout the entire charge. The plaintiff's proof is sufficient if it establishes a *prima facie* case, while, when the burden shifts or where the burden was originally upon the defendant, it must make out its case by

proof which satisfies the mind of every juror. Such is not the law, and never was.

WILLFUL TRESPASS.

Assignments of Error Nos. XXI, XXII, XXIII, XXIV, XXV, and XXVI.

In this portion of its charge the court is trying to tell the jury that we were willful trespassers on our own ground, and that though the plaintiff in its complaint had not claimed this ground nor the mineral therein, but had expressly pleaded that it was our ground and our mineral, yet they might assess punitive damages against us. As to this we claim that even if the plaintiff had pleaded in its complaint facts showing a willful trespass, and had proved upon the trial the allegations of its complaint, the court did not correctly define to the jury what a willful trespass was and is, and that its construction is wholly wrong. The court's theory of a willful trespass seems to be that, if after we knew in any way, either by the commencement of the suit or otherwise, that the plaintiff (defendant in error here) was claiming extralateral rights in our ground, if we continued to mine, we were willful trespassers; and not only this, but as much so as if we were mining ore underneath the surface of the St. Louis and not within the boundaries of our own claim. It did not count for anything that we had a conveyance from this plaintiff for the compromise ground and its mineral contents, which conveyance is without any reddendum clause whatever and conveys to us absolutely every right which the plaintiff had in the ground; it mattered nothing what effect the fact that we had fought this right out through all the courts into which the case could be carried, and it had been finally adjudicated and determined, not only that we were the owners of the ground and the mineral, but

that the plaintiff had no right, title, or interest in or to them or to the possession of anything within these surface boundaries. The bare fact that, notwithstanding all this, the plaintiff still claimed some right or interest in the compromise ground in and of itself made us willful trespassers if we mined anything out of that ground after we had knowledge of this claim of the plaintiff. Is it possible that this can be the law?

> "The quality of the good faith which warrants its application is satisfied if the wrong was done without culpable negligence or willful disregard of the rights of others, in the *honest and reasonable belief that the act was rightful.* Notice of the existence of an adverse claim is an important element to be considered; but such notice alone will not necessarily place the wrong-doer in the position of a culpably willful trespasser and subject him to the more onerous measure of liability."
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> *Sutherland on Damages,* § 1020, pp. 2987-2990.

> "On the other hand the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, *and the wrong was not intentional, the value of the property when first taken must govern.*"
>
> *Woodenware Cases,* 106 U. S., 432, 434.

The court was wrong—clearly wrong—as to what was a willful trespass, and it was further wrong when it told the jury that they might give damages beyond compensatory if they found that the trespass was willful. The mere fact that the trespass is willful is not sufficient in and of itself to give the jury the right to assess smart money, as evidently they did in this case, because the amount of their verdict is clearly shown on the face of this record to be far beyond compensatory.

In trespass, to justify the imposition of exemplary or

punitive damages, something more must be shown than the doing of an unlawful or injurious act. There must be evidence that the injury was inflicted maliciously or wantonly or with circumstances of contumely and indignity, or at least with wrongful motives.

Day vs. Woodworth, 13 How. (U. S.), 363.
Phila., &c., R. Co. vs. Quigley, 21 How. (U. S.), 202.
Milwaukee, &c., R. R. Co. vs. Arms, 91 U. S., 489, 493.
Fohrman vs. Con. Traction Co., 63 N. J. L., 391.

"None of these things, we think, can justly be imputed to the defendant here, under the evidence."

Thomas vs. Southern, 30 S. E., 343.
Alabama vs. Arnold, 4 So., 363.
Hansley vs. Jamesville, 32 L. R. A., 543.
Craven vs. Bloomingdale, 171 N. Y., 450.
Curran vs. Warfield, 60 Miss., 808.

"Again, the appellant failed to show any carelessness or recklessness in cutting of the trees, or any lack of reasonable precaution in endeavoring to ascertain the boundaries of appellee's land. Therefore, even conceding the agency and authority of Farlow, the appellee would only be liable for the actual value of the timber cut."

Compton, Ault & Co. vs. Marshall, 29 S. W., 1058.
3 *Elliott on Evidence*, § 2149.

"The burden rests upon the party who assails the faith of the transaction or conveyance, to show that it was fraudulent by either direct or circumstantial evidence.

"In the absence of evidence to the contrary, the law presumes that every man performs his business transactions in good faith and for honest purposes; and any one who assails the transaction or alleges that it was done in bad faith, or for a dishonest and

fraudulent purpose, has the burden of showing the fraud or bad faith."

Railroad Co. vs. Farnell, 98 U. S., 479.
Jones vs. Simpson, 116 U. S., 609.
Pruitt vs. Wilson, 103 U. S., 22.
Gulf, &c., R. R. Co. vs. Johnson, 54 Fed., 474.
Wilson vs. Fuller, 9 Kan., 365.
Hatch vs. Bagley, 12 Cush., 27.
Boughman vs. Penn, 31 Kan., 504.
Elliott vs. Stoddard, 98 Mass., 145.
Walker vs. Collins, 50 Fed., 737; 59 Fed., 70.

And the court was likewise wrong in that part of its charge, instruction No. 19, in which it tells the jury that "the defendant (plaintiff in error here) must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass had it been committed upon and within the surface boundaries of the St. Louis claim." It almost seems unnecessary to cite a single authority to show how far wrong the court was in this proposition. The bare statement of it ought to be enough to refute it.

In *Mining Co. vs. Fitzgerald,* Fed. Cas., vol. 15, No. 8158, Judge Hallett concisely states the rule of law in this regard, to which, so far as we know, there has been no decision to the contrary save and except in the case at bar:

> "Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in another territory.
>
> "To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one shall show by a preponderance of testimony, that such deposit belongs to another lode having its top or apex elsewhere."

To the same effect are the following cases:

Doe vs. Mining Co., 54 Fed., 935.
Con. Wyoming M. Co. vs. Champion M. Co., 63 Fed., 540.
Duggan vs. David, 4 Dak., 110.
Cheeseman vs. Shreve, 37 Fed., 37.
Iron S. M. Co. vs. Elgin M. Co., 118 U. S., 196.
Iron S. M. Co. vs. Campbell, 17 Colo., 267.

In *Iron Silver Mining Co. vs. Campbell, ut supra,* it is said:

> "A patent gives a *prima facie* right to the patentee to the exclusive possession of the premises covered by the patent. When others rely upon a right to follow into the patented territory a vein which they claim has its top or apex outside the premises covered by such patent, the burden to establish such right rests upon them."

And at page 275 Chief Justice Hayt says:

> "The plaintiffs, by the introduction of their patent, insured a *prima facie* right to the possession of the premises in controversy, and we are unable to find any admission in the complaint sufficient to overcome such *prima facie* showing. Appellants, relying upon the claim of right to follow their vein into the territory included within the side lines of plaintiff's claim, were properly held to have had the burden of proving such claim."

This proposition is so well established that it is surprising to find the Circuit Court for the District of Montana so wide of the mark.

Assignment XXXVII.

In our assignment No. XXXVII, which was directed towards the error in instruction No. 32 of the court's charge to the jury, it is fair to say that it gets this instruction directly

from the decision of the Court of Appeals, reported in 102 Fed., 130. One would hunt long and go far to find any case either supporting the doctrine laid down in this instruction or to the contrary; but it seems as if the bare statement of facts is sufficient to show that it must be erroneous.

The plaintiff in error was engaged in mining certain ores in the territory which was afterwards blocked out as defendant in error's blocks 8 and 10. To prevent this the defendant in error procured an injunction restraining the plaintiff in error from further extracting or removing any ore from the premises described or disposing of, treating, or reducing any of the ore that had been theretofore removed or extracted from said premises. A copy of this injunction order appears in the Record at page 80, and an order modifying it on page 81, followed by the agreement upon which the same was modified. Of the ores taken out there were 60 or 61 tons stored in the yards of the plaintiff in error at the time of the trial in this case, which ore, of course, was subject to the order of the court in the other action. In addition to that in the yards there were 65 or 70 tons in the upraise from the 190-foot level, only about 40 tons having been milled.

It seems to us that the jury should have been instructed not to consider the ore thus held under the plaintiff's injunction in estimating damages to be returned in this case. The theory upon which the case was being tried was that the defendant (plaintiff in error here) had taken, carried away, and converted to its own use certain ores, the property of the plaintiff (defendant in error here). Of course, as pointed out, no claim of this sort is made by any allegation in its complaint, and the court was trying this case upon the theory that such an allegation ought to be in the complaint, and that it would put it there even if the plaintiff had not done so. Now, how can it be said that a thing has been converted the conversion of which has been stopped by the plaintiff in the case by an injunction?

The defendant in error now has judgment for the value of these ores taken out of blocks 8 and 10. It is a maxim of equity jurisprudence that when once a court of equity has obtained jurisdiction of a cause it will retain it until it can do complete justice between the parties; and this without regard to the character of the remedy. A court of equity will often decree the payment of a sum of money as damages, or in other ways grant legal relief upon a suitable cause of action.

If the defendant in error shall succeed in the action which it has brought and in which this injunction order was issued, then the court can and ought to, and doubtless will, enter an order against the plaintiff in error, requiring it to turn over these ores so mined and held by it, and thereupon the defendant in error will have both its judgment for the value of the ores and the ores themselves. In other words, "it will have its cake and eat it, too."

> "The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in one suit the rights and duties of all the parties which really grow out of or are connected with the subject-matter of that suit."
>
> 1 *Pomeroy's Eq. Jurisp.*, § 114, and cases cited.

We must either leave the matter in this way and take chances on a suitable recovery or, under this instruction and the opinion of the Court of Appeals, we must go into court and surrender at discretion—that is, if we want to keep this plaintiff from proving damages against us in this suit for these ores so held under the injunction, we have got to surrender all claim to them, and then they may be offset. And in surrendering such claim, to be consistent, we should say in this suit, "We have no defense. What is the amount of your damage?" We respectfully submit that no decision can be found justifying this. And so we might continue,

but we are persuaded that we have already said more, and cited more authorities, than are necessary in a case of this kind; a case of *trespass quare fregit*, where the plaintiff says that he does not own the close that was broken nor the fruit trees that were damaged, but that the defendant owns them; a case where proof has been received on the most vital proposition in the case, with not a word of allegation in the pleading to warrant it; a case where the plaintiff, to maintain his contention, must establish that a line can be parallel with itself; that a judgment between the parties involving the same subject-matter is void and of no effect, and that it may enter upon, appropriate, and take possession of the whole or any part of the surface of a mining claim which may be necessary to enable him to follow a vein or lode, having a part of its apex in its surface, on its dip into an adjoining claim. Neither the rule of damages laid down in the charge nor any part of the instruction, for that matter, clearly or correctly expresses the law; but we do not deem it profitable to criticise them further.

X.

We submit the judgments below should be reversed.

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ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

Decisions of Circuit Court of Appeals (102 Fed. Rep., 430, and 104 Fed. Rep., 664).

APPENDIX TO BRIEF FOR PLAINTIFF IN ERROR.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24098

102 F. Rep., 430.

MONTANA MIN. CO., LIMITED,
v.
ST. LOUIS MIN. & MILL. CO. OF MONTANA.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 567.

1. MINING CLAIMS—CONVEYANCE TO SETTLE DISPUTED BOUNDARY—CONSTRUCTION.—In compliance with a decree for specific performance of a contract made between the owners of two adjoining mining claims in settlement of a suit brought to determine a disputed boundary between them, the owner of one claim conveyed to the owner of the other the strip in dispute, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein." *Held,* that such conveyance had no other effect than to fix the surface boundary between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral rights under the ground so conveyed; such boundary being a side line of its claim.
2. SAME—ACTION FOR CONVERSION OF ORE—PLEADING.—A complaint which alleges that plaintiff is the owner of a mining claim, and of all the precious metals contained in any vein or lode, through its entire depth, whose apex is within the surface lines of such claim, and that defendant, the owner of a claim which adjoins one of the side lines of plaintiff's, has mined and removed ore from a vein which has its apex in plaintiff's claim, is sufficient, in the absence of a demurrer thereto, to support a judgment in favor of plaintiff for the conversion of such ore, although it does not specifically allege the facts which show that the boundary between the claims of the parties is a side line of plaintiff's claim, beyond which it has extralateral rights.

3. SAME—POSSESSION OF VEIN.—Possession of the surface of a mining claim is possession of a vein or lode having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim.
4. SAME—TRESPASS—DAMAGES RECOVERABLE.—Where, in an action for the conversion of ore, an injunction has been issued, in compliance with which the defendant has stored certain ore theretofore mined, it is not entitled to have the value of such ore taken into account in reduction of damages unless it proves such value, and returns or tenders the ore to the plaintiff.

In Error to the Circuit Court of the United States for the District of Montana.

Chas. J. Hughes and Cullen, Day & Cullen, for plaintiff in error.
Arthur Brown, Thomas C. Bach, E. W. Toole, and H. P. Henderson, for defendant in error.

Before Gilbert, Ross, and Morrow, Circuit Judges.

GILBERT, *Circuit Judge:*

The defendant in error, the St. Louis Mining & Milling Company of Montana, was the plaintiff in an action brought against the plaintiff in error, the Montana Mining Company, Limited, for trespass and conversion of ore which was alleged to have been taken from the plaintiff's mine by the defendant in the action. The plaintiff in the action owned the St. Louis mining claim, and the defendant owned the Nine Hour mining claim, which adjoined it on the east. The principal contention in the case concerns the construction to be given to a conveyance which was executed by the owners of the St. Louis claim to the owners of the Nine Hour claim. The conveyance was made to settle a controversy that had arisen concerning the easterly boundary line of the St. Louis claim. That was the older of the two claims. At the time of applying for a patent the locators thereof included in their survey a portion of the premises which were

claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action thereupon. Before the cause came on for trial the suit was compromised. It was agreed that, as soon as patent was obtained to the St. Louis claim, the owners thereof would convey back to the owners of the Nine Hour claim the strip of land which was in controversy,—a strip 30 feet wide, to be described by metes and bounds,—"together with all mineral therein contained." The owners of the St. Louis claim, having obtained the patent, refused to make the conveyance. Suit was brought by the owners of the Nine Hour claim for specific performance of the contract. In the complaint in that suit it was alleged that the contract had been made "for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode-mining claim and the said St. Louis mining claim." A decree was rendered in the suit in favor of the plaintiff therein, and in pursuance thereof a conveyance was executed by the St. Louis Mining & Milling Company, the defendant in error here, conveying to the Montana Mining Company, Limited, the 30-foot strip, by metes and bounds, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein," etc. It was shown upon the trial of the case at bar that in the St. Louis claim there are two veins,—one, the discovery vein, running through the claim from end to end, northerly and southerly, and dipping to the east; and a second vein apexing for a long distance within the claim, and dipping easterly underneath the Nine Hour claim, a portion thereof dipping underneath the premises which were conveyed by the deed above referred to. The question involved in the suit is the ownership of the ores of said second vein, which lie beneath the said conveyed premises, and of which the apex of the vein which carries the same lies entirely within the St. Louis claim.

It is contended by the plaintiff in error that by the deed above referred to there was conveyed to it, from the owners of the St. Louis claim, title to all the ores lying beneath the surface of the strip of land therein described, and lying eastward of a vertical plane extended downward on the division line so created between the two claims. We are unable to assent to this contention. In interpreting the conveyance in question, regard must be had, not only to its terms, but to

the subject-matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. Said the court in Richmond Min. Co. *v.* Eureka Min. Co. 103 U. S. 846, 26 L. Ed. 560, "The language used is to be construed with reference to the peculiar property about which the parties were contracting." The court, in the light of the circumstances of that case, held that a line "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course towards the center of the earth." The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only. No dispute had arisen concerning the ores beneath the surface. The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action

itself, fixing the boundary upon the very line which they *contended* was the true line? It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to devest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words "together with all the minerals therein contained" is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein." Counsel for the plaintiff in error rely upon two decisions which, it is said, favor the construction which they contend for,—the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, and Stinchfield *v.* Gillis, 107 Cal. 86, 40 Pac. 98. In the first case two owners of several adjoining claims had fixed and agreed upon a line running northerly for a fixed distance, which should be a division between the claims. It was not a line running with the strike of the vein, but across it. Thereafter a controversy arose concerning the right to mine the ores of the vein at a point beneath the surface further north than the line of division extended. The court held that the line so arbitrarily adopted must be projected as far as the lode extended, and must necessarily divide all that the location upon the surface carried. In that case the parties to the agreement had, by the terms thereof, made so clear their intention to divide their claims by a vertical plane, and to confine their mining rights to either side thereof, that there was no room for construction. In the case of Stinchfield *v.* Gillis it was held that if the locator of a mining claim should convey a portion of his claim by metes and bounds, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. Said the court (page 90, 107 Cal., and page 100, 40 Pac.), "All that we hold is that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff,

and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." We do not see that either case affords light upon the proposition involved in the case at bar. Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy; and the language of the contract and of the deed sustains that conclusion.

It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim, rather than across, or that it dips in any given direction, and that for want of these allegations the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken. It is true that the complaint does not mention the direction of the discovery vein or its dip. It contains the allegation, however, that the defendant in error is the owner of, and in the possession of, the St. Louis quartz lode-mining claim, "and of the quartz, rock, and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock, through their entire depth, the tops or apices of which lie within the surface lines of the said fractional portion of said St. Louis lode-mining claim." It describes the mining claim by metes and bounds, and shows that it is about 1,500 feet in length by nearly 600 feet in width. The description closes with these words: "Said lots, Nos. 54 and 55A, extending 1,500 feet in length along said St. Louis vein or lode." It alleges that the strip of land beneath the surface of which the ores in controversy were mined lies east of the east side line of the claim. It alleges that the dip of one of the veins, having a portion of its apex inside of the surface of the St. Louis claim, is to the east, and dips under and beneath the 30-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim, and extending beneath the Nine Hour claim,

the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits.

In Walrath *v.* Champion Min. Co., 19 C. C. A. 328, 72 Fed. 978, this court said:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. * * * When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location."

In Del Monte Min. Co. *v.* Last Chance Min. Co., 171 U. S. 89, 18 Sup. Ct. 908, 43 L. Ed. 86, it was said:

"Our conclusions may be summed up in these propositions: First. The location as made on the surface by the locator determines the extent of rights below the surface. Second. The end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third. Every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth. The only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines."

Upon the expressions of the supreme court just quoted, and upon the assumption that the locator of a mining claim has, unless the contrary be shown, complied with the law in locating his claim, the defendant in error contends that the presumption arises that the discovery vein in this instance runs lengthwise with the claim, and not across the same. This contention it is unnecessary here to consider. We find in the complaint the distinct allegation that the defendant in error owns all the precious metals contained in any vein

or lode of mineral-bearing rock, through their entire depth, whose apex is within the surface of the St. Louis quartz lode-mining claim, and the further averment that the ores in controversy were mined from a vein which so apexes within the surface of the claim. These averments are sufficient to show that a cause of action existed, and are sufficient to sustain the judgment.

It is contended that the court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive, but actual. Said the court in Mining Co. *v.* Cheesman, 116 U. S. 533, 6 Sup. Ct. 483, 29 L. Ed. 713:

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location."

In Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16, it was held that possession of the surface is possession of all veins or lodes whose apices are within such surface lines. Said the court (page 277, 4 Mont., and page 17, 2 Pac.):

"The possession of the respondent was sufficient to maintain this action. * * * Possession of the surface of a mining-claim location is possession of all veins, lodes, and ledges, the tops or apices of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines."

The case of Hugunin *v.* McCunniff, 2 Colo. 367, cited by the plaintiff in error, does not sustain his contention. In that case the defendants had conveyed a mine, and delivered a shaft and level in the mine to the vendor of the plaintiffs, retaining a certain other shaft and level in the same lode, not connected with the first. The defendants afterwards took ore from the level and shaft, which they retained. In

trespass for the ore so taken, it was held that the plaintiffs had not the actual or the constructive possession of the place from which the ore was taken, for the reason that, throughout the length of the level retained by them, the defendants had actual possession, extending to all depths and levels from the surface to the center of the earth.

Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from "disposing of, treating, and reducing any ores heretofore removed or extracted from said premises," for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or were left in the possession of, the defendant in error, and to have submitted evidence of their value. But there is another answer to this contention of the plaintiff in error. Although the instruction which was so requested was refused by the court, it does not appear from the bill of exceptions that the court did not, in its charge to the jury, fully and properly instruct upon that branch of the case. The bill of exceptions does not purport to contain all of the charge of the court. It recites but two instructions, and says that the court, "among other things," so instructed the jury. Considering the whole record and all the assignments of error, we find no ground for reversing the judgment, and it is accordingly affirmed.

104 F. Rep., 664.

ST. LOUIS MIN. & MILL. CO. OF MONTANA
v.
MONTANA MIN. CO., LIMITED.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1900.)

No. 594.

1. MINING CLAIMS—SIDE AND END LINES—SECONDARY VEINS.—Where the end lines of a mining claim have been established, they remain the end lines as to all veins found within its surface boundaries.
2. SAME—EXTRALATERAL RIGHTS—VEIN CROSSING COMMON SIDE LINE AT ANGLE.—When a secondary or accidental vein crosses a common side line between two mining claims at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, inasmuch as neither statute nor authority permits a division of the crossing part of the vein the rights of the parties will be determined by the priority of location, and the entire vein considered as apexing upon the senior location until it has wholly passed beyond its side line, without regard to the direction in which the vein dips.

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Montana.

This is an action originally brought by the St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass, and the value of certain ores alleged to have been wrongfully appropriated and taken by the Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting in a verdict for the plaintiff in error in the sum of $23,209, plaintiff in error now brings the suit to this court upon certain assignments of

error, which, it alleges, deprived it of a larger verdict. There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis mining claim, situated near Marysville, in the state of Montana; and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the Discovery vein and the Drum Lummon vein. The accompanying map gives the general location of the two claims, and all details of description which need be considered in this opinion:

By way of explanation of the map, it may be stated that the line, E, C, D, is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim, and 133 feet southerly from the point, C, on the line, C, E. The line marked "108-foot plane" is a similar plane 108 feet from the said point, C, and the line marked "520-foot plane" is a similar plane 520 feet southerly from the northeasterly corner of the St. Louis claim on the line, D, C. The strip of land included within A, B, C, E, is a strip 30 feet wide, called in the record the 30-foot or compromise strip. The arrows show the direction of the dip of the vein to be eastwardly, and underneath the Nine Hour claim. The Discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a discrepancy between

the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point, H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the north, and that the foot wall does not pass out of the St. Louis claim until a considerable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts. Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into, by which the owners of the St. Louis claim agreed to convey to the owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip; and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim, and further charged the jury that the line, E, C, was a side line common to the two claims, and that, so long as the Drum

Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of $23,209. A writ of error was sued out by the defendant in error to this court, and this court, in Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430, sustained the lower court upon these propositions as submitted to the jury, holding the line, E, C, D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion the 30-foot strip will not be treated separately, but will be regarded as part and parcel of the Nine Hour claim. Upon the trial, however, the plaintiff in error further offered evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made—First, as to the portion of the vein between said planes underneath the 30-foot strip; and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip. But, for the purpose of applying the principles of law which will control here, these two offers may be considered as one, in accordance with the decision in 102 Fed. 430, *supra*. The court sustained objections to the evidence offered, and, upon assignments of error based upon these rulings, the case is now before this court.

Arthur Brown, H. P. Henderson, E. W. Toole, and T. C. Bach, for plaintiff in error.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for defendant in error.

Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, *Circuit Judge* (after stating the facts as above):

The assignments of error raise but one question which need now be passed upon, all others having been adjudicated upon the writ of error of the defendant herein, in the case of Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (C. C. A.)

102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But, while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question. Two important elements enter into the consideration of mining rights: First, the surface boundaries, defining the rights acquired by reason of a vein or veins apexing within such boundaries; and, second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line, E, C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line, E, C, is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. Iron Silver Min. Co. *v.* Elgin Min. & Smelt. Co., 118 U. S. 196, 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; Walrath *v.* Champion Min. Co., 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. Ed. 170. This court has already determined that the line, E, C, D, is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides:

"The locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part

thereof," and that, under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim. For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line, and 25 feet in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitably be cut by a plane parallel with and midway between the 108 and 133-foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the senior locator (Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. Ed. 1140), the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule, and its application to the case before the court, should be the same whether the vein dips towards the junior location or towards the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit only remains so long as the entire vein is within the claim, cites the case of Fitzgerald *v.* Clark,

17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, the decision in which was affirmed by the supreme court of the United States. 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87. But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply. If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex, or in this case the footwall. It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed, which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.

Ross, *Circuit Judge:*

I dissent. The case of Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430, referred to in the foregoing opinion, affirmed the existence of extralateral

rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. 102 Fed. 430. The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should be granted, and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line, only, be discussed by counsel, and fully considered by the court, before final determination.